FILED

(1) No. 951980 MAY 29 1996

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In The

Supreme Court of the United States

October Term, 1995

DAVID RIVKIN, EDWARD RIVKIN, JUDITH RIVKIN, t/a GALAXY MANOR, A NEW JERSEY PARTNERSHIP,

Petitioners,

vs.

DOVER TOWNSHIP RENT LEVELING BOARD,

Respondent.

Petition for Writ of Certiorari to the New Jersey Supreme Court

PETITION FOR WRIT OF CERTIORARI

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124 pp

QUESTIONS PRESENTED

Over the course of four public hearings on landlords' rent increase application, a sitting rent control board member expressly declared himself a tenants' advocate, personally investigated the application outside the record, testified against the application as to that information, advised a tenant to file Federal Fair Housing charges against the landlord and threatened and verbally abused the landlord and his attorney, all in the presence of the full board in public session. The board denied landlords' pleas for the biased member's disqualification and he persisted in the same manner throughout the hearings, ignoring admonitions by board counsel and finally leading board deliberations to deny most of the application. The trial court, as fact finder, noted that his taint "permeated" the board. The questions presented are:

I. Whether plainly biased municipal agency decision making violates substantative due process, triggering liability under 42 U.S.C. § 1983?

II. Whether the conduct should be deemed "random and unauthorized", barring plaintiffs' claims under 42 U.S.C. § 1983 pursuant to *Parrat's* procedural due process analysis?

III. Whether the conduct should be deemed "purposeful discrimination" in violation of equal protection, triggering liability under 42 U.S.C. § 1983?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statute Involved	1
Statement of the Case	2
Reasons for Granting the Writ	5
I. Plainly Biased Municipal Agency Action Violates Substantive Due Process And Triggers Liability Under 42 U.S.C. § 1983.	10
II. Plainly Biased Conduct At Public Hearings Should Not Be Deemed "Random And Unauthorized" And Plaintiffs' Claims Under 42 U.S.C. § 1983 Are Not Barred Pursuant To *Parratt's* Procedural Due Process Analysis.	17
III. Plainly Biased Municipal Agency Decision Making Should Be Deemed "Purposeful Discrimination" In Violation Of Equal Protection, Triggering Liability Under 42 U.S.C. § 1983.	20

Contents

Page

Conclusion 22

TABLE OF CITATIONS

Cases Cited:

Anastasio v. Planning Bd. of Twp. of West Orange, 209 N.J. Super. 499 (App. Div.), *cert. denied*, 107 N.J. 46 (1986) 13

Armstrong v. Manzo, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965) 20

Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988) 14

Bello v. Walker, 840 F.2d 1124 (3d Cir.), *cert. denied*, 488 U.S. 851 (1988) 12, 14

Brady v. Town of Colchester, 863 F.2d 205 (2d Cir. 1988) 12, 14

Collins v. City of Harker Hts., 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992) 6

Daniels v. Williams, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986) 15, 16

DeBlasio v. Zoning Board of Adjustment for the Twp. of West Amwell, 53 F.3d 592 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 352 (1995) 7

Contents

Page

Del Monte Dunes v. City of Monterey, 920 F.2d 1496 (9th Cir. 1990) 12, 13, 14

Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926) 8

General Motors Corp. v. City of Linden, 143 N.J. 336 (1996) 7

Hochberg v. Freehold Racing Ass'n., 40 N.J. Super. 276, 123 A.2d 46 (1956) 18

Kramer v. Bd. of Adj. Sea Girt, 45 N.J. 268 (1965) 13

Lemke v. Cass County, 846 F.2d 469 (8th Cir. 1987) 14

Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986) . 12

Nectow v. City of Cambridge, 277 U.S. 183, 48 S. Ct. 447, 72 L. Ed. 842 (1928) 8

Parrat v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) ..... i, 4, 9, 10, 15, 17

Ramos v. Gallo, 596 F. Supp. 833 (D. Mass. 1984) 5

Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1951) 11

Roy v. City of Augusta, 712 F.2d 1517 (1st Cir. 1983) ... 12, 13

Contents

Page

Snowden v. Hughes, 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1944) 10, 20, 21

Tarkowski v. Robert Bartlett Realty Co., 644 F.2d 1204 (7th Cir. 1980) 10, 21

Village of Arlington Hgts. v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) 8

Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974) 8

Wheeler v. City of Ocean Pleasant Grove, 664 F.2d 99 (5th Cir. 1981), *cert. denied*, 456 U.S. 973 (1982) 14

Statutes Cited:

28 U.S.C. § 1257(a) 1

42 U.S.C. § 1983 ..... i, 1, 3, 4, 5, 10, 12, 17, 20, 21

42 U.S.C. § 1988 ..... 3, 4

Dover Township Ordinance Section 104-35.2 14

Rule Cited:

New Jersey Court Rule 4:69 3

Contents

Page

Other Authorities Cited:

N.J. Constitution Art. VI, § 5, ¶4 3

Michael A. Pane, *Local Government Law,* New Jersey Practice Vol. 35 (West Publishing Co., 1993) Sections 351 p. 54 20

Michael A. Pane, Jr., *Federal Courts Receptive to Civil Rights Claims,* 144 N.J. L.J. 626 (May 13, 1996) 8

Michael J. Phillips, *The Non-Privacy Applications of Substantive Due Process,* 21 Rutgers Law Journal 537 (1990) 7

Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process,* 16 U. Dayton L. Rev. 313 (1991) 7, 8

APPENDIX

Appendix A — Opinion and Decision of the New Jersey Supreme Court Decided February 29, 1996 ..... 1a

Appendix B — Opinion and Decision of the Superior Court of New Jersey for the Appellate Division Dated December 8, 1994 ..... 38a

Appendix C — Order of the Superior Court of New Jersey, The Law Division, Ocean County Filed April 14, 1993 ..... 53a

Contents

Page

Appendix D — Transcript of Hearing Dated February 16, 1993 ..... 55a

Appendix E — Order of the Superior Court of New Jersey, Law Division, Ocean County Filed November 15, 1991 ..... 61a

Appendix F — Transcript of Hearing and Decision Dated November 1, 1991 ..... 63a

Appendix G — Transcript of Hearing and Findings by the Honorable Rosalie B. Cooper, J.S.C., Dated October 25, 1991 ..... 75a

Petitioners, David Rivkin, Edward Rivkin and Judith Rivkin, trading as Galaxy Manor, a New Jersey Partnership, respectfully petition for a Writ of Certiorari to review the judgment of the Supreme Court of New Jersey.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported at 143 N.J. 352, 671 A.2d 567 (1996) and is reproduced in the Appendix filed herewith ("App.") at 1a. The opinion of the Superior Court of New Jersey, Appellate Division is reported at 277 N.J. Super 559, 649 A.2d 1356 (1994) and is reproduced in the Appendix at 38a. The unreported opinions and orders of the Superior Court of New Jersey, Law Division in this case are reproduced at 53a, 55a, 61a, 63a and 75a.

STATEMENT OF JURISDICTION

The New Jersey Supreme Court entered its judgment on February 29, 1996. The jurisdiction of this court is invoked under 28 U.S.C.§ 1257 (a).

STATUTE INVOLVED

The pertinent provision of the Federal Civil Rights Act, as amended, 42 U.S.C. § 1983 is set forth below:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

David Rivkin, Edward Rivkin and Judith Rivkin are partners in Galaxy Manor, a mobile home park in Dover Township, New Jersey. In May, 1990, the Rivkins filed an application with the Dover Township Rent Leveling Board ("the Board") seeking approval of an application for rental increases based upon capital improvements allowable by local ordinance made within the mobile home park in the amount of $59,624.96.

The Board conducted four hearings on the application in June, July, August and October, 1990. From the outset, Board member Edward Baltarzuk, adopted a hostile and plainly biased attitude toward the Rivkins and their attorney, Michael E. Levin. He declared on the record that he was "here to serve the people of the mobile home parks." As the New Jersey Supreme Court noted "he continually challenged the Rivkins and their representatives both on a personal basis, referring to their attorney as a 'yo-yo,' and on a partisan basis, introducing facts from outside the record." (App. A, 4a).

Baltarzuk threatened the Rivkins stating: "you are looking for trouble and you are going to get it." He urged a tenant to file a complaint against the Rivkins for alleged violations of the equal housing opportunity laws. Baltarzuk deliberately investigated facts outside the record pertaining to the cost of the capital improvement items, tenant rent levels and other issues and attempted to discredit the application by testifying as to those facts during the hearings. On one occasion, during a discussion of street cleaning equipment, Mr. Baltarzuk stated "I don't care if he cleans the streets with a toothbrush" referring to

Mr. Rivkin. These examples characterize an almost unbroken continuum of harassment and partisanship.

During the hearings, the Rivkins made several applications for Baltarzuk's removal by the Board, which were repeatedly denied. In deliberations, Baltarzuk continued to play an antagonistic role, spearheading discussion to deny or reduce items in the application and voting against most of the capital improvements. In the end, the Board granted slightly more than one third of the capital improvements contained in the application, for a total of $20,641.42 in rent increases.

In accordance with the New Jersey procedure for challenging local agency action, the Rivkins filed an action in lieu of prerogative writs pursuant to N.J. Constitution Art. VI, § 5, ¶4 as implemented by New Jersey Court Rule 4:69. In addition, the Rivkins alleged a cause of action under 42 U.S.C. § 1983, asserting that Baltarzuk's actions and the Board's failure to disqualify him deprived them of their property in derogation of their constitutional rights of substantive and procedural due process as well as equal protection of the laws.

The trial court agreed that Baltarzuk's biased and prejudiced behavior deprived the Rivkins of their due process rights and remanded the entire application to the Board. (App. F, 63a; App. G, 75a). The remand order specifically required the hearings to be conducted without Baltarzuk. (App. E, 61a). The court reserved decision on the Rivkins' application for counsel fees under 42 U.S.C. § 1988 and declined to make a substantive determination on the rental increase application. The Rivkins unsuccessfully sought leave to file an interlocutory appeal challenging the remand order to the New Jersey Appellate Division.

Upon the rehearing, the Board approved an additional rental increase of $25,089.67 for a total of $45,731.09 or nearly two and

one half times the original amount. Thereafter, the court considered the attorney fee and compensatory damages issues and awarded the Rivkins $39,679.55 in counsel fees and costs and $6,303.34 in compensatory damages under 42 U.S.C. §§ 1983, 1988. (App. C, 53a). The court stated in its bench opinion that Baltarzuk's actions had "permeated the Board," and that the Board was "recalcitrant" regarding the Rivkins' request to disqualify Baltarzuk and that, therefore, the Board's behavior constituted a deprivation of the Rivkins' due process rights. (App. D, 55a).

Both parties appealed. The Rivkins appealed the remand order, asserting that the trial judge should have determined the substantive issue of the rental increases due to Baltarzuk's prejudicial effect on the Board. The Rivkins also appealed the trial court's denial of certain portions of its attorney fee application. The Board appealed the award of §1983 counsel fees and compensatory damages.

The New Jersey Superior Court, Appellate Division affirmed the remand order but reversed the trial court's finding of due process violations under §1983, vacating the order for attorneys fees and costs. 277 N.J. Super 559, 649 A.2d 1356 (1994) (App. B). Without consideration of the dichotomy between substantive and procedural due process violations, the Appellate Division applied *Parrat v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) and held that Baltarzuk's behavior was "random and unauthorized", that the plaintiffs had an adequate postdeprivation remedy in the form of the action in lieu of the prerogative writs and, therefore, the requirements of due process had been met.

The New Jersey Supreme Court granted the Rivkins' Petition for Certification and, in a ruling which candidly acknowledged its divergence of opinion with numerous Circuit Courts of Appeal, affirmed the judgment of the Appellate

Division. While acknowledging the dichotomy between substantive and procedural due process claims under the *Parrat* analysis, the New Jersey court ruled that the reach of substantive due process claims should be sharply limited to "state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning and harmful as literally to shock the conscience of a court." (App. A, 12a) (*quoting Ramos v. Gallo*, 596 F. Supp. 833, 837 (D. Mass. 1984).) With respect to the Rivkins' procedural due process claims, the New Jersey Supreme Court agreed that Baltarzuk's behavior was "random and unauthorized", not the result of an "established state procedure" and that the availability of New Jersey's prerogative writ action constituted an adequate postdeprivation remedy. Finally, the court dismissed the Rivkins' equal prctection claims, stating that "the majesty of the Equal Protection Clause should not be invoked every time that applications are incorrectly denied by a municipal agency." (App. A, 32a).

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for writ of certiorari because of the pivotal importance of § 1983 remedies to the protection of property rights against government abuse. Uncertainty as to the availability of the § 1983 remedies affects property rights at all levels: whether in the case of a large conglomerate seeking a determination of its oil and gas exploration rights or the residential property owner seeking to build a small addition to his home, adverse agency action based on personal biases effects a system of dubious justice. The effects are pervasive: every city and town is called upon to determine property rights without authoritative guidance in the proper conduct of hearings and deliberations to determine these property rights. There are no doubt economic costs passed down the economic chain insofar as the uncertainty of government determinations clouds property values and discourages

prospective development. It is, therefore, of vital importance for the court to address the constitutional implications of deliberately biased municipal agency action. This case presents an opportunity for the Court to erect the "guide posts for responsible decision making" which were noted for their scarcity in *Collins v. City of Harker Hts.*, 503 U.S. 115, 125, 112 S. Ct. 1061, 1068, 117 L. Ed. 2d 261, 273 (1992).

The importance of this case and the need for the Court's supervision is highlighted by the patchwork of conflicting views expressed in lower court opinions. The conflict was candidly noted by the New Jersey Supreme Court in this case when it stated:

> We acknowledge that the standard that we adopt today may be contrary to a more expansive interpretation given the Due Process Clause by many circuit courts, which have found that "arbitrary or irrational" government actions deny substantive due process rights. See, e.g. *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 593 (3rd. Cir.) (concluding that "in the context of land use regulations, a property owner states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached") *Cert. Denied*, __ U.S.__, 116 S. Ct. 352, 133 L. Ed. 2d 247 (1995) (additional citations omitted).

App. A, 17a. The New Jersey Supreme Court noted that its view was contrary to case law in the Second, Third, Fourth and Ninth Circuits. *Id.* at 17a, 18a.

Commentators and courts have increasingly noted this divergence with most circuits recognizing an "arbitrary and irrational" test for substantive due process in the land use context and only one or two circuits imposing stricter standards. *See, e.g.*, Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process*, 16 U. Dayton L. Rev. 313 (1991) wherein the author collects cases from the First, Second, Third, Fifth, Eighth, and Ninth Circuits adopting the arbitrary and irrational or arbitrary and capricious standard in actions against municipal boards asserting substantive due process claims. *(Id.* at notes 78, 79).

Another commentator has enumerated no less than six tests which have gained currency in substantive due process review: (1) rational basis review; (2) the arbitrary or capricious standard; (3) a shocks-the-conscience-like standard; (4) a factor balancing test used in excessive force claims; (5) deference to professional standards and the exercise of professional judgment; and (6) a recklessness or deliberate indifference standard. Michael J. Phillips, *The Non-Privacy Applications of Substantive Due Process*, 21 Rutgers Law Journal 537, at 575-77 (1990) (citations omitted). A recent article comparing this case and its companion *General Motors Corp. v. City of Linden*, 143 N.J. 336 (1996) with the less restrictive federal view expressed in *DeBlasio v. Zoning Board of Adjustment for the Twp. of West Amwell*, 53 F.3d 592 (3d. Cir. 1995), *cert. denied*, 116 S. Ct. 352 (1995) concluded:

> In Federal Court, to maintain an action for violation of substantive due process, the plaintiff must prove that the regulation or decision was "arbitrary or irrational". In contrast, in state court to overturn such a decision, the plaintiff must prove that such a

> decision was "arbitrary, capricious and unreasonable". The courts of New Jersey view "arbitrary, capricious and unreasonable" as being a term of art relating to a failure to a local agency to follow necessary standards in its decision making, rather than as involving "egregious governmental abuses against liberty or property," which appears to be the view of the Third Circuit. *The U.S. Supreme Court will have to provide further clarification and guidance before this issue is resolved.*

(Emphasis added). Michael A. Pane, Jr., *Federal Courts Receptive to Civil Rights Claims,* 144 N.J. L. J. 626, at 657 (May 13, 1996). Similarly, it has been stated "[T]he lower courts' differing approaches to the treatment of substantive due process in these areas suggest the obvious need for Supreme Court clarification." *Levinson, supra.* 16 U. Dayton L. Rev. at 318. Cited in *Rivkin, supra.* 143 N.J. at 371. (App. A, 20a). Arguably, the most compelling reason for granting the Writ, is that the judgment below is at odds with Supreme Court rulings in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S. Ct. 114, 121, 71 L. Ed. 303 (1926) and *Nectow v. City of Cambridge*, 277 U.S. 183, 187, 48 S. Ct. 447, 448, 72 L. Ed. 842 (1928) and, more recently, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974) and *Village of Arlington Hgts. v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977). Each of these cases has applied a variant of the "arbitrary or irrational" test for the constitutionality of local land use enactments and decisions. However, as noted, there is considerable debate among the lower courts and the Supreme Court's guidance is needed.

Finally, beyond the conflict with federal court precedent,

the New Jersey Supreme Court decision is erroneous in several important respects. First, it did not believe the blatant and deliberate partisanship and abusive behavior on the part of Mr. Baltarzuk at open public meetings was "shocking to the conscience" so as to give rise to a substantive due process claim. The Rivkins contend that short of physical violence or blatantly racist behavior, it is hard to conceive of a state action which could be more shocking to the conscience than night after night of unyielding abuse and partisanship by a public official in full view of his fellow board members who, in turn, took no action to curtail these activities. Our constitutional conscience should be shocked when the *quasi* judicial or legislative functions carried out by local land use and rent control boards can be carried out with such contempt for an applicant's basic rights to fundamental fairness. The New Jersey court's view of conscience shocking behavior is so narrow that it is defined out of existence in the context of land use and rent control unless there is an actual assault or racial incident. This cannot and should not be.

After dispatching the Rivkins' substantive due process claims, the New Jersey court analyzed the case under the procedural due process framework established in *Parrat v. Taylor*. In so doing, it erred in finding that the continuous pattern of conduct by Mr. Baltarzuk and the failure of the defendant board to disqualify him constituted "random and unauthorized" behavior. It remains unclear how that factual determination could be made when the individual publicly declares himself to be an advocate rather than an impartial fact finder and the board acquiesces when it does not remove him. The plain meaning of the terms "random and unauthorized" simply cannot be coaxed out of this scenario.

In addition, the question of whether behavior is "random and unauthorized" requires a finding as to whether or not the

board could practicably provide a predeprivation remedy. In theory, if the behavior is truly random and authorized, as when it is unknown to the state, it is impossible for the state to provide a predeprivation remedy. Here, where Mr. Baltarzuk made his position clear from the very first moment of the four hearings, the state had notice of the deprivation well in advance of its final determination of the capital improvement application. A remedy (disqualification) was practicable, available and appropriate. Therefore, under the *Parrat* analysis, the New Jersey Supreme Court erroneously found that the offending conduct was "random and unauthorized."

Finally, in rejecting the Rivkins' Equal Protection Claims the New Jersey Court overlooked the "purposeful discrimination" standard enunciated in *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S. Ct. 397, 401, 88 L. Ed. 497 (1944). *Snowden* has been applied to the land use context in *Tarkowski v. Robert Bartlett Realty Co.*, 644 F.2d 1204, 1206 (7th Cir. 1980) where the court noted: "There must be allegations of unfair and discriminatory conduct purposefully directed toward plaintiffs." The record in this case firmly establishes that Baltarzuk acted in a way which was unfair and discriminatory and purposefully directed toward the Rivkins.

I.

PLAINLY BIASED MUNICIPAL AGENCY ACTION VIOLATES SUBSTANTIVE DUE PROCESS AND TRIGGERS LIABILITY UNDER 42 U.S.C. § 1983.

The Rivkins' § 1983 claims are properly founded on substantive due process protections. Therefore, the doctrine of *Parrat* does not bar their 1983 claims and remedies. Notably, all three New Jersey Courts acknowledged that the record of the rent control hearings clearly established that Baltarzuk was biased,

that he acted as an advocate for the tenants, that he had sought information outside the record, and that he had tainted the deliberations of the board. (App. A, 4a-5a).[1]

The court below deemed that the conduct as contained in the record is not "shocking to the conscience". In this reference to *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1951) New Jersey has expressed its view that substantive due process claims will only be recognized in cases factually similar to *Rochin*, where police officers ordered a doctor to pump Rochin's stomach against his will. It concluded:

> In light of the clearly evident trend of the Supreme Court to limit substantive due process rights under the Fourteenth Amendment we believe, that the denial of a property right in the context of municipal governance rarely will rise to the level of a substantive due process violation.

(App. A, 13a). It further stated "disputes about the regularity of state procedures do not represent the type egregious conduct that rises to the level of a substantive due process violation." (*Id.* at 36a).

The New Jersey court implies that substantive due process violations are limited to personal privacy and physical intrusion cases. However, a voluminous body of case law in the land use context contradicts the New Jersey Supreme Court's restrictive reading of the substantive due process clause. As noted above,

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1. The New Jersey Supreme Court stated "although Baltarzuk maintained that he was not prejudiced and should not have been disqualified, we accept the lower courts' findings for purposes of this appeal". (App. A, 21a).

the majority of Federal Circuit Courts of Appeal have found substantive due process violations where the municipal agency conduct is "arbitrary and irrational". For example, in *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990) the court held that allegations that city council members revoked a previously approved development permit in response to political pressure after plaintiff had complied with fifteen conditions of approval stated a viable substantive due process claim which survived summary judgment. In *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir.), *cert. denied*, 488 U.S. 868 (1988) it was held that the plaintiffs had sufficiently alleged a substantive due process violation where it was alleged that certain town council members had personal animosity towards one of plaintiff's employees and would not allow issuance of the building permit for so long as the plaintiff employed that individual. In one Second Circuit opinion, the political and intermunicipal rivalry that gave rise to plaintiff's § 1983 claims manifested itself in a statement by one of the zoning commission members closely resembling the statements made by Mr. Baltarzuk here. Specifically, in *Brady v. Town of Colchester*, 863 F.2d 205 (2nd Cir. 1988) the zoning commission member, a Township Official, divulged her partisan motives against the neighboring Borough of Colchester when she said "if Mr. Brady (plaintiff) wasn't renting to the Borough I would vote to accept the plans." *Id.* at 203.

In *Littlefield v. City of Afton*, 785 F.2d 596, 603-606 (8th Cir. 1986) the court noted that the Third, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits have held that substantive due process claims may be based on the denial of a land use permit. It particularly noted that even the First Circuit, which has expressed the most restrictive view in this area "has recognized that on rare occasions a denial of a land use permit may be the basis for a § 1983 claim" citing *Roy v. City of Augusta*, 712 F.2d 1517 (1st Cir. 1983). In *Roy*, the city council defied a state court

order to issue a license to a billiard hall and instead issued an expired license. The *Roy* court said that the plaintiff must "prove that his injury was due not merely to the law's delay and the councillors' errors but to [the council's] deliberate disregard of the state's fundamental process". *Id* at 1524. In sum, New Jersey has elected to part company with the broad based federal precedent that municipal agency decision making can result in substantive due process claims. The federal view looks to wrongful motivation as opposed to mere error and there was no mere error in this case.

The New Jersey Supreme Court rejects the "arbitrary and irrational" standard utilized by many federal court opinions to find substantive due process violations. At the same time, New Jersey confuses the federal "arbitrary and irrational" standard with New Jersey's standard in agency review cases, "arbitrary, capricious and unreasonable." (App. A, 17a-20a). That standard requires challengers to agency action to demonstrate that the action was not based on "substantial evidence" in the record made before that agency. *See, e.g., Kramer v. Bd. of Adj. Sea Girt*, 45 N.J. 268, 296 (1965). *Anastasio v. Planning Bd. of Twp. of West Orange*, 209 N.J. Super. 499, 522 (App. Div.), *cert. denied*, 107 N.J. 46 (1986) noted that "while the words arbitrary and capricious may sound harsh, they are simply the standard of appellate review and the decision that the board has been arbitrary and capricious is simply a finding of error. Further, as happened here, New Jersey law granted the victim of such a mistaken action a complete remedy, so there was no deprivation, only a delay." *Id.* (citations omitted).

In contrast, the federal court usage of the term "arbitrary and irrational" has been equated with more than a mere mistake. Rather, the federal terminology implicates actions which are devoid of justification, unrelated to the merits or motivated by partisan, political or personal reasons. *See, eg., Del Monte*

Dunes supra, 920 F.2d 1496 (9th Cir. 1990); *Brady v. Town of Colchester*, 863 F.2d 205, 215 (2d Cir. 1988); *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988); *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir.), *cert. denied*, 488 U.S. 851 (1988); *Wheeler v. City of Ocean Pleasant Grove*, 664 F.2d 99, 100 (5th Cir. 1981), *cert. denied*, 456 U.S. 973 (1982).

The New Jersey Supreme Court adhered to the minority view of the Eighth Circuit decision in *Lemke v. Cass County*, 846 F.2d 469, 471 (8th Cir. 1987) wherein Chief Judge Arnold noted in a concurrence that substantive due process protection should be reserved for "truly irrational" government abuses that bear no relationship to the merits of the pending matter. (App. A, 19a). As an example, Judge Arnold suggested a decision process by coin toss. However, a coin toss would have been more "truly rational" in regards to consideration of the merits of the rental increase application than the affirmative distortion of the process occasioned by Baltarzuk's conduct and the Board's mute expression of acquiescence. The New Jersey court took Judge Arnold's dictum two steps beyond its plain meaning when it reasoned that Baltarzuk's actions were not "truly irrational" since he operated from the "mistaken premise . . . " "that it was his duty to serve as a tenants' advocate . . . " and that all of Baltarzuk's actions were related to the merits of the rent proceeding." (App. A, 19a). This strained reasoning is faced with several difficulties. First, the ordinance under which the Rent Control Board operates clearly prohibited Mr. Baltarzuk from adopting a partisan position or from considering information outside the record, much less gathering of such information or testifying regarding such information.[2]

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2. Dover Township ordinances Section 104-35.2 as set forth in the Appellate Division opinion specifies that

Board shall give both the landlord and tenant

(Cont'd)

Second, Baltarzuk was admonished by the Board's attorney on more than one occasion with specific instructions explaining that he was not permitted to obtain information from outside the record or testify at the hearings. Despite the fact that Baltarzuk disregarded these express guidelines at each hearing the Board repeatedly rejected pleas for his disqualification. Against this background, it is uncertain how the New Jersey Supreme Court deems Baltarzuk's blatant advocacy as properly resting on a "mistaken premise" about his role or in any way related to the merits of the application.

In *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986), the Court applied the *Parrat* doctrine to the negligent acts of a prison guard who left a pillow on the jail stairs causing a prisoner to slip and sustain injuries. In his concurrence, Justice Stevens described the reach of the Due Process Clause:

> Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty or property. (citations omitted). No decision of this court before *Parrat* supported the view that negligent conduct by a state official, even though causing injury, constitutes a deprivation under the Due Process Clause. This history reflects the traditional and common-sense notion that the Due Process Clause, like its forbearer in the Magna Carta (citation omitted) was

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(Cont'd)

> reasonable opportunity to be heard before making any determination and shall base its determination on the reasonable, credible evidence before it.

(App. B, 48a).

> "intended to secure the individual from the arbitrary exercise of the powers of government," (citations omitted). *See also, Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935 (1974) ("the touch stone of due process is protection of the individual against arbitrary action of government, *Dent v. West Virginia*, 129 U.S. 114, 123, 9 S.Ct. 231, 233, 32 L. Ed. 623 (1889)") (citation omitted). By requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property" the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, *eg., Rochin, supra,* it serves to prevent government power from being "used for purposes of oppression," (citations omitted).

Id. at 106 S. Ct. 665. The Rivkins argue that government power was used for purposes of oppression, that the proceedings were devoid of fairness and that the board acted arbitrarily and deliberately within the meaning of Justice Stevens' comments in *Daniels*.

The Rivkins further argue that irrational conduct, for purposes of substantive due process analysis should be equated with conduct that plainly displays an utter disregard for applying the law fairly, deliberately and even handedly. That, in the first instance, is shocking to the conscience. It is not equal justice and it is not fairness in any modern, democratic sense as set forth by Justice Stevens in *Daniels v. Williams*. As board members, it is one thing to assert a point of view, and quite another to

demonstrate that you have no point of view except opposition and animosity towards the applicant. Such bias is inescapably arbitrary, irrational and unrelated to the merits of an application affecting important property rights. Because there was a clear denial of substantive due process, *Parrat* does not apply and the New Jersey Supreme Court judgment should be reversed.

II.

PLAINLY BIASED CONDUCT AT PUBLIC HEARINGS SHOULD NOT BE DEEMED "RANDOM AND UNAUTHORIZED" AND PLAINTIFFS' CLAIMS UNDER 42 U.S.C. § 1983 ARE NOT BARRED PURSUANT TO *PARRATT'S* PROCEDURAL DUE PROCESS ANALYSIS.

When dealing with procedural due process cases, the *Parrat* doctrine requires a finding that the state action was "random and unauthorized" and, therefore, a predeprivation remedy was impracticable.[3] The compelling logic of *Parrat* is that it is unreasonable to expect state governments at all levels to be able to police the day-to-day activities of every government official and employee. Such a requirement would turn the mistake or misguided zeal of each such individual into a federal cause of action under §1983 no matter how remote the activity.

That logic falls away where the conduct is known, as it was here, to the government agency. It continued from the very beginning of the hearings through the final deliberations. Furthermore, it continued over the repeated objections of the Rivkins' attorney and their requests for Baltarzuk's disqualification. It even continued despite the admonitions of the Board's own attorney that the conduct was unacceptable. In

3. The Rivkins, of course, maintain that there is no need to apply the doctrine of *Parrat* since the presence of substantive due process violations places this case beyond its reach.

sum, the Board knew of the conduct and, therefore, had the opportunity to provide a predeprivation remedy. The true test of whether conduct is "random and unauthorized" turns on the question of the state's knowledge of the deprivation at a point in time where it is capable of providing a remedy before the deprivation is complete.

The New Jersey opinion questions the board's ability to provide the predeprivation remedy suggested by the Rivkins. New Jersey relies on *Hochberg v. Freehold Racing Ass'n.*, 40 N.J. Super. 276, 123 A.2d 46 (1956) to decide that the Board did not "authorize" Baltarzuk's actions by failing to disqualify him because they did not have the power to do so. (App. A, 25a-26a). The *Hochberg* opinion does not support this premise and the court's rationale is not persuasive. In *Hochberg*, the New Jersey Appellate Division reversed local planning board action where a voting member had a direct pecuniary interest in the applicant race track. The *Hochberg* court only addresses the scope of the official's duty in such a case. It quite clearly does not address any limitation on the powers of the Planning Board to disqualify a conflict-tainted member who does not voluntarily do so when it states:

> Whenever a substantial question is raised as to the disinterestedness of one of several officials sitting on a matter, and the other officials can take care of the case, it usually is just as well for the official in question to withdraw therefrom, so that not the faintest shadow be cast on the integrity of the determination.

Hochberg, supra, 40 N.J. *supra,* 284. The flaw in the court's reasoning is that if *Hochberg* is read as limiting the Board's powers to disqualify, what is presumed to happen at hearings

where a conflict is raised and a board member refuses to step down? Surely, it makes better sense that the agency should disqualify its obstinate member, or at a minimum, decline to count that member for a quorum or voting purposes. No legal authority prohibits boards from doing so.

The Rivkins contend that the Board's power to disqualify is implicit in its enabling ordinance. Specifically, in the powers and duties delegated to the rent leveling board by the Dover Code, the Board:

> Is hereby granted and shall have and exercise, in addition to other powers herein granted, all the powers necessary and appropriate to carry out and execute the purposes of this article, . . .

Paragraph 2 of the same ordinance requires the board to give "both the landlord and tenant reasonable opportunity to be heard before making any determination and shall base its determination on the reasonable, credible evidence before it . . . " When confronted with a biased member who refuses to hear the case on its merits the board is presented with a clear violation of its own rules. The enabling language of the ordinance clearly grants it the powers "necessary and appropriate to carry out and execute the purposes of the article."

In fact, a leading treatise on New Jersey local government law recommends that attorneys should advise members of the following procedures concerning perceived conflict situations:

> 3. If the attorney, after discussing the situation with a member potentially in conflict, believes there is a conflict, then the member should step aside. Failure to do so may be cause from removal from office.

Michael A. Pane, *Local Government Law,* New Jersey Practice Vol. 35 (West Publishing Co., 1993) Section 351, p. 54.

The basic premise of procedural due process is that, before a deprivation of property or liberty takes place, the affected party must be afforded notice and an opportunity to be heard "at a meaningful time and in a meaningful manner". *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S. Ct. 1187, 1181, 14 L. Ed. 2d 62 (1965). While the Rivkins may have had notice and an opportunity to be heard, it cannot be said that there was anything meaningful in the manner of the board's hearings so long as the panel included, and was heavily tainted by, a clearly biased board member. In keeping with that fundamental principle of due process, the New Jersey Supreme Court ruling should be reversed.

III.

PLAINLY BIASED MUNICIPAL AGENCY DECISION MAKING SHOULD BE DEEMED "PURPOSEFUL DISCRIMINATION" IN VIOLATION OF EQUAL PROTECTION, TRIGGERING LIABILITY UNDER 42 U.S.C. § 1983.

In rejecting the Rivkins' Equal Protection Claims the New Jersey Supreme Court overlooked the "purposeful discrimination" standard enunciated in *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S. Ct. 397, 401, 88 L. Ed. 497 (1944). *Snowden* considered claims of constitutional deprivation under the predecessor statute to 42 U.S.C. § 1983 by a primary election candidate who claimed he was improperly excluded from the election ballot. The court noted that the petitioner's Equal Protection Claims would succeed if:

> There is shown to be present in it (ie. the state

> action) an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person . . . (citation omitted). . . . or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself. . . (citations omitted). . . . there must be a showing of "clear and intentional discrimination" (citations omitted).

Here the discrimination by Baltarzuk was both intentional and purposeful and the discrimination was apparent on the face of his actions.

The *Snowden* doctrine recently has been applied to the land use context in *Tarkowski v. Robert Bartlett Realty Co.*, 644 F.2d 1204, 1206 (7th Cir. 1980). The court stated:

> A claim under § 1983 for discriminatory enforcement of zoning regulations must involve an element of "intentional or purposeful discrimination." *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L. Ed. 497; *Tollett v. Laman*, 497 F.2d 1231 (8th Cir. 1974). There must be allegations of "unfair and discriminatory conduct purposely directed toward plaintiffs."

The record in this case clearly describes unfair and discriminatory conduct purposefully directly toward the Rivkins. Therefore, the § 1983 claims should not have been dismissed.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION AND DECISION OF THE NEW JERSEY SUPREME COURT DECIDED FEBRUARY 29, 1996

SUPREME COURT OF NEW JERSEY
A-26 September Term 1995

DAVID RIVKIN, EDWARD RIVKIN, and JUDITH RIVKIN, t/a GALAXY MANOR, a New Jersey Partnership,

Plaintiffs-Appellants,

v.

DOVER TOWNSHIP RENT LEVELING BOARD,

Defendant-Respondent.

Argued October 24, 1995 — Decided February 29, 1996

On certification to the Superior Court, Appellate Division, whose opinion is reported at 277 *N.J. Super.* 559 (1994).

Reuel E. Topas argued the cause for appellants (*Levin, Shea, Pfeffer, McMahon and Russell*, attorneys).

Courtland T. Babcock, II, argued the cause for respondent (*Babcock, Hennes & Bielory*, attorneys).

Bruce D. Greenberg argued the cause for *amicus curiae* Hudson County Taxpayers' Association (*Greenbaum, Rowe, Smith, Ravin & Davis*, attorneys).

Stuart R. Koenig argued the cause for *amici curiae* New Jersey State League of Municipalities and New Jersey Institute of Municipal Attorneys (*Stickel, Koenig & Sullivan*, attorneys).

Appendix A

Margaret B. Carmeli submitted a brief on behalf of *amicus curiae* The New Jersey Manufactured Housing Association (*Giordano, Halleran & Ciesla*, attorneys; *Paul H. Schneider*, of counsel; *Ms. Carmeli* and *Debra J. Rubenstein*, on the briefs).

The opinion of the Court was delivered by

O'HERN, J.

The question in this appeal is whether a party that has appeared before a local rent leveling board has a claim under the Federal Civil Rights Act, 42 *U.S.C.* § 1983, for an unconstitutional deprivation of property when a member of the board has acted in a biased manner and the other members of the board did not remove or disqualify the member lacking in impartiality. The question is related to that concerning an allegedly unconstitutional tax assessment in *General Motors v. Linden, N.J.* (1996), also decided today. In *General Motors*, we relied on *National Private Truck Council. Inc. v. Oklahoma Tax Comm'n*, 515 *U.S.* __, 115 *S. Ct.* 2351, 132 *L. Ed.* 2d 509 (1995), to conclude that there was no basis for courts to award relief under § 1983 when an adequate state legal remedy exists to correct an arbitrary tax assessment. We find that similar principles of federalism lead generally to the same conclusion in the context of land use controls.

The primary issue is whether the doctrine of *Parratt v. Taylor*, 451 *U.S.* 527, 101 *S. Ct.* 1908, 68 *L. Ed.* 2d 420 (1981), applies in this context of municipal rent controls. *Parratt* holds that when a deprivation of property results from the random and unauthorized actions of a state employee and pre-deprivation process would have been impracticable, there is no due process violation so long as an adequate post-deprivation remedy is available. We hold that, absent egregious misconduct that shocks

the conscience in the sense of violating civilized norms of governance, or invidious discrimination on the part of a board member or board, so long as the State provides a plain, adequate and timely remedy to redress irregularities in the proceedings, a party aggrieved by the determinations of a municipal rent leveling board does not have a claim for relief under 42 *U.S.C.* § 1983.

I.

David Rivkin, Edward Rivkin, and Judith Rivkin are partners in Galaxy Manor, a mobile home park in Dover Township. Dover Township has a Mobile Home Park Rent Leveling Ordinance ("Code") that requires landlords to apply to the Dover Township Rent Leveling Board ("Board") for rental increases. Dover Code § 104-35A provides that the Board be made up of one mobile home park landlord, one mobile home park tenant, and three non-affiliated public members.

In May 1990, the Rivkins filed an application with the Board for a rent increase based on $59,624.96 of capital improvements to the Galaxy Manor mobile home park. The Code provides:

> A landlord may seek an additional charge for major capital improvements.... The landlord seeking a capital improvement surcharge shall appeal for said surcharge to the Rent Leveling Board, which shall determine . . . if said improvement is a major improvement and, if so, the amount of increase granted for such major improvement and establish the conditions of such increase.
>
> [Dover Code § 104-34B.]

Appendix A

The Board conducted four hearings on the application in June, July, August and October, 1990. Edward Baltarzuk, the mobile home park tenant member of the Board, took an active part in the proceedings. Baltarzuk, who was actually a resident of the Galaxy Manor Mobile Home Park, appeared to view his position on the Board as one of advocacy rather than adjudication. He stated on the record that it was his function to "serve the people of the mobile home park." He continually challenged the Rivkins and their representatives both on a personal basis, referring to their attorney as a "yo-yo," and on a partisan basis, introducing facts from outside the record.

Baltarzuk's manner was threatening to the Rivkins. He said: "You are looking for trouble and you are going to get it. " Baltarzuk urged a tenant witness to file a complaint against the Rivkins for violating equal housing opportunity laws. The following is a typical antagonistic exchange between the Rivkins and Baltarzuk:

> Mr. Levin (attorney for Rivkin): That is our application. Our obligation is to provide this application —
>
> Mr. Baltarzuk: You are supposed to file the truth, sir.
>
> Mr. Levin: Before you call anyone a liar, you are the fellow that is challenging our application without giving us the benefit of telling us where you get the information.
>
> Mr. Rivkin, is the rental structure as contained within the application true and accurate?

> Mr. Rivkin: As of the first of May, yes.
>
> Mr. Baltarzuk: Therefore, this application should not even be heard. It is an illegal rental increase. I have a person right here in the audience who is paying a wrong rent. How can she pay 275? You are telling me here she is paying 223.
>
> Mr. Levin: I find this incredible, that somebody who has to make a judgment here has apparently taken it upon himself to go out and solicit whatever it is your [sic] trying to tell us. . . .

Baltarzuk, in essence, offered himself as a witness concerning certain items and was, in effect, testifying in the proceedings.

The Rivkins requested that Baltarzuk be removed from the proceedings. The Board denied these requests and, with Baltarzuk participating, granted $20,641.42 in rent increases for capital improvements, finding that the majority of the Rivkins' application constituted "capital expenditures" rather than "major capital improvements" under the ordinance. Capital expenditures may not be recovered by rent increases.

The Rivkins appealed to the Law Division to determine the amount of the rental increase. They claimed that the "arbitrary, capricious, and unreasonable" findings of the Board and the failure of the Board to disqualify Baltarzuk for his obvious bias constituted a civil rights violation allowing recovery of damages and attorney's fees under 42 *U.S.C.* § 1983.

Appendix A

The Law Division reserved decision on the application for attorney's fees but agreed that Baltarzuk's misconduct and manifest bias had tainted the proceedings. However, it refused to make a substantive determination on the rental increase. It ruled that the Board members were not biased and would not be influenced once Baltarzuk was removed. The court remanded the matter to the Board with all issues to be reconsidered without the participation of Baltarzuk. The Appellate Division denied the Rivkins' motion for leave to appeal the remand order. The hearings proceeded on remand without the participation of Baltarzuk. Upon rehearing, the Board approved an additional increase of $25,089.67 for a total of $45,731.09. The Law Division then disposed of the issue of attorney's fees and constitutional damages. In its bench opinion, the Law Division found that Baltarzuk's actions had "permeated the Board," "that the Board was recalcitrant with respect to th[e] matter" of his participation, and had "violated the plaintiffs' due process rights." It awarded $39,679.55 in counsel fees and $6,303.34 in compensatory damages under 42 *U.S.C.* §§ 1983, 1988.

Both parties appealed. The Rivkins appealed the remand to the Board, claiming that the Law Division should have made the substantive determination of the rental increase because the entire Board had been tainted by Baltarzuk's bias. The Board appealed the imposition of § 1983 relief and attorney's fees.

The Appellate Division affirmed the remand order, but found that the plaintiffs had suffered no due process violation under § 1983, and therefore were not entitled to attorney's fees or compensatory damages. 277 *N.J. Super.* 559, 570 (1994). Basing its ruling on *Parratt v. Taylor,* 451 *U.S.* 527, 101 *S. Ct.* 1980, 68 *L. Ed.* 2d 420 (1981), the Appellate Division found the actions of Baltarzuk to be "random and unauthorized," that the

plaintiffs had had an adequate post-deprivation remedy under state law, and that the requirements of procedural due process had been satisfied. We granted plaintiffs' petition for certification. 140 *N.J.* 275 (1995).

II

Section 1983 is the modern codification of the first section of legislation passed as part of the Ku Klux Klan Act of 1871 ("the Act").[1] The Act, entitled "an Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes," addressed conditions then prevalent in some of the southern States. *Monroe v. Pape*, 365 *U.S.* 167, 171-173, 81 *S. Ct.* 473, 476-77, 5 *L. Ed.* 2d 492, 497 (1961) (quotation omitted). At that time, former slaves and their descendants were subjected to egregious violations of liberty and property, and state governments were either incapable or

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1. As originally enacted, the protection of the law extended only to the rights, privileges and immunities secured by the Constitution. The Act was later amended to cover rights secured by "the laws" of the United States. Section 1983 now reads in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
>
> [42 *U.S.C.* § 1983 (1988).]

unwilling to protect these citizens. During debate in the House of Representatives, Mr. Beatty, a Member of Congress from Ohio, summarized the conditions that the Act was meant to address:

> Men were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent.
>
> [*Id.* at 175, 81 *S. Ct.* at 478, 5 *L. Ed.* 2d at 499 (citing Cong. Globe, 42d Cong., 1st Sess, 428).]

The Act addressed these problems in three ways; it overrode certain state laws, it provided a remedy where state law was inadequate, and it provided a federal remedy where the state remedy was adequate but unavailable in practice. *Id.* at 173-74, 81 *S. Ct.* at 477, 5 *L. Ed.* 2d at 498. As the title of the Act states, the constitutional basis of the Act was the Fourteenth Amendment. However, in the *Slaughterhouse Cases*, 83 *U.S.* (16 Wall.) 36 (1873), the Supreme Court narrowly construed the rights conferred by the Fourteenth Amendment. The Court ruled that only those rights that "owe their existence to the Federal government, its national character, its Constitution, or its laws" applied to the states by way of the Fourteenth Amendment. *Id.* at 79. Civil rights were specifically excluded from those the Court deemed subject to federal review through the Fourteenth Amendment. *Ibid.* "[S]ection 1983 . . . lay dormant as a result of restrictive judicial construction until the Supreme Court's 1961 decision in *Monroe v. Pape.*" Note, *Section 1983 and Federalism*, 90 *Harv. L. Rev.* 1133, 1135-36 (1977).

Appendix A

In *Monroe v. Pape, supra,* a husband and wife sued the City of Chicago and its police officers for a violation of their Fourth Amendment rights when the police conducted a warrantless search of their home and subjected the husband to a humiliating strip search. In finding that the local police officers were liable to the plaintiffs for their unlawful action, irrespective of an available state remedy, the Court refused to limit the Act to the circumstances described in the arguments made in favor of its passage:

> Although the legislation was enacted because of the conditions that existed in the South at that time, it is cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and again in the debates. . . . Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court.
>
> [*Monroe, supra,* 365 *U.S.* at 183, 81 *S. Ct.* at 482, 5 *L. Ed.* 2d at 502-03.]

So well-developed a body of law has followed *Monroe* that an entire treatise is devoted to this single section of the Code. Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* (3d ed. 1991).

Ordinarily, the first task in any § 1983 action is to identify the state actor, "the person acting under color of law," that has caused the alleged deprivation. *See Monell v. New York City Dep't of Social Services,* 436 U.S. 658, 691, 98 S. Ct. 2018, 2036,

56 *L. Ed.* 2d 611, 636 (1978). The Board does not dispute that its members were "persons acting under color of law."[2]

The second task is to identify a "right, privilege or immunity" secured to the claimant by the Constitution or other federal laws of the United States. 42 *U.S.C.* § 1983 (1988). Plaintiffs often misstate their claims by alleging a violation of § 1983 rights. Section 1983 "is not itself a source of substantive rights," but merely provides "a method of vindicating federal rights elsewhere conferred. . . . " *Baker v. McCollan*, 443 *U.S.* 137, 144 n.3, 99 *S. Ct.* 2689, 2694 n.3, 61 *L. Ed.* 2d 433, 442 n.3 (1979). We must therefore first identify the specific constitutional rights allegedly infringed.

III

SUBSTANTIVE DUE PROCESS

In this case, plaintiffs primarily assert that they have been denied their constitutionally guaranteed rights under the Fourteenth Amendment to "substantive due process" and, in the alternative, that they have been deprived of property without the "procedural due process" guaranteed by the Fourteenth Amendment.

In his concurring opinion in *Daniels v. Williams*, 474 *U.S.* 327, 106 *S. Ct.* 662, 88 *L. Ed.* 2d 662 (1986), Justice Stevens

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2. There is no issue asserted of qualified or absolute immunity for the Board members. Absolute and qualified immunity for individual state actors largely are reserved for those acting in judicial or quasi-judicial capacities. *See Butz v. Economou*, 438 *U.S.* 478, 507, 514, 98 *S. Ct.* 2894, 2911, 2915, 57 *L. Ed.* 2d 895, 916, 921 (1978); *Anastasio v. Planning Bd. of West Orange*, 209 *N.J. Super.* 499, 524 (App. Div. 1986).

explained that the Due Process Clause is the source of three different kinds of constitutional protection:

> First, it incorporates specific protections defined in the Bill of Rights. . . . Second, it contains a substantive component, sometimes referred to as "substantive due process," which bars certain arbitrary government actions "regardless of the fairness of the procedures used to implement them." Third, it is a guarantee of fair procedure, sometimes referred to as "procedural due process" [under which the State may not] take property without providing appropriate procedural safeguards.
>
> [*Id.* at 337, 106 *S. Ct.* at 677-68, 88 *L. Ed.* 2d at 672 (Stevens, J., concurring) (citation and footnotes omitted).]

Richard Arnold, Chief Judge of the Eighth Circuit Court of Appeals, has described the doctrine of substantive due process as "an oxymoron if there ever was one" and as "a linguistic monstrosity, if not a legal one." *Lemke v. Cass County*, 846 *F.*2d 469, 471 (8th Cir. 1987) (Arnold, J., concurring). In its most discredited form, the substantive due process doctrine led to the invalidation of many state and federal attempts to enact social legislation. *See, e.g., Lochner v. New York*, 198 *U.S.* 45, 64, 25 *S. Ct.* 539, 546, 49 *L. Ed.* 937, 944-45 (1905) (invalidating overtime labor law as undue interference with freedom of contract). Suffice it to observe that considerable confusion surrounds the doctrine. Michael T. Carton, Note, *25 Seton Hall*

L. Rev. 1560, 1560-61 (1995) (remarking that substantive due process analysis has resulted in "obscure and . . . contradictory holdings, widespread debate, and general perplexity").

To understand the concept of substantive due process, it is necessary to understand that prior to the application of many of the specific provisions of the Bill of Rights to the states the primary federal protection against state action was in the Due Process Clause of the Fourteenth Amendment. *See* Rosalie Berger Levinson, *Protection Against Government Abuse Of Power: Has The Court Taken The Substance Out Of Substantive Due Process*, 16 *U. Dayton L. Rev.* 313 (1991) (observing that only after gradual process of incorporation did most of provisions of Bill of Rights apply to states through Fourteenth Amendment Due Process Clause) [hereinafter Levinson]. *Rochin v. California*, 342 *U.S.* 165, 72 *S. Ct.* 205, 96 *L. Ed.* 183 (1951), is a noted example of a substantive due process violation in the preincorporation era. In *Rochin*, the Court determined that the actions of police officers in instructing a doctor to pump Rochin's stomach against his will were "so brutal and so offensive to human dignity" that they "offend[ed] a sense of justice" and resulted in denying Rochin his substantive due process rights. *Id.* at 173-74, 72 *S. Ct.* at 210, 96 *L. Ed.* at 190-91 (quotation omitted). Justice Frankfurter equated the conduct of the officers in *Rochin* with the conduct of police officers in *Malinski v. New York*, 324 *U.S.* 401, 414, 65 *S. Ct.* 781, 89 *L. Ed.* 1029, 1037 (1945), which, the Justice said, had violated "civilized standards of law." *Rochin, supra*, 342 *U.S.* at 169, 169 n.2, 72 *S. Ct.* at 208, 208 n.2, 96 *L. Ed.* at 188, 188 n.2. In its most characteristic form, substantive due process is reserved for "state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning and harmful as literally to shock the conscience of a court." *Ramos v. Gallo*, 596 *F. Supp.* 833, 837 (D. Mass. 1984).

It is to this background that we may relate the Court's statement in *Albright v. Oliver*, 510 *U.S.* __, __, 114 *S. Ct.* 807, 813, 127 *L. Ed.* 2d 114, 123-24 (1994), that, when a particular provision of the Bill of Rights "provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process' must be the guide for analyzing th[e] claim." *Ibid.* (quotation omitted).

The Supreme Court has long hesitated to afford an overly broad reading to the substantive component of the Due Process Clause. The *Albright* decision (involving a detention based upon an unsubstantiated warrant) is only the most recent manifestation of the Court's reluctance to expand the doctrine. *See Collins v. City of Harker Heights*, 503 *U.S.* 115, 125, 112 *S. Ct.* 1061, 1068, 117 *L. Ed.* 2d 261, 273 (1992) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended.").

In the light of the clearly evident trend of the Supreme Court to limit substantive due process rights under the Fourteenth Amendment, we believe that the denial of a property right in the context of municipal governance rarely will rise to the level of a substantive due process violation.

The substantive due process doctrine "does not protect individuals from all governmental actions that infringe liberty or injure property in violation of some law." *PFZ Properties Inc. v. Rodriguez*, 928 *F.*2d 28, 31 (1st Cir.) (quotation and citations omitted), *cert. granted*, 502 *U.S.* 956, 112 *S. Ct.* 414, 116 *L. Ed.* 2d 435 (1991), *and cert. dismissed*, 503 *U.S.* 257, 112 *S. Ct.*

117 *L. Ed.* 2d 400 (1992). Rather, substantive due process is reserved for the most egregious governmental abuses against liberty or property rights, abuses that "shock the conscience or otherwise offend . . . judicial notions of fairness . . [and that are] offensive to human dignity." *Weimer v. Amen*, 870 *F.*2d 1400, 1405 (8th Cir. 1989) (quotations omitted). With the exception of certain intrusions on an individual's privacy and bodily integrity, the collective conscience of the United States Supreme Court is not easily shocked. *See Irvine v. California*, 347 *U.S.* 128, 133, 74 *S. Ct.* 381, 384, 98 *L. Ed.* 561, 569 (1954) (finding no Fourteenth Amendment violation when state police officers broke into defendant's home and secretly placed a microphone in defendant's bedroom, as the trespass involved no coercion, violence or brutality to the defendant). Recall that in *Rochin* Justice Frankfurter had equated substantive due process violations with governmental abuses that "are . . . too close to the rack and the screw to permit of constitutional differentiation." *Rochin, supra*, 342 *U.S.* at 172, 72 *S. Ct.* at 210, 96 *L. Ed.* at 190. The conduct of an errant board member who berated an applicant and brought in facts outside the record at a rent proceeding in violation of acceptable board practice does not rise to the level of a substantive due process violation under the Supreme Court's standards.

In *Creative Environments, Inc. v. Estabrook*, 680 *F.*2d 822 (1st Cir.), *cert. denied*, 459 *U.S.* 989, 103 *S. Ct.* 345, 74 *L. Ed.* 2d 385 (1982), the First Circuit Court of Appeals rejected a real estate developer's claim that a municipal planning board deprived the corporation of its substantive due process rights under the Fourteenth Amendment. The corporation alleged a conspiracy by the planning board to deny the corporation's subdivision plan. It based its conspiracy theory upon the town's "overall distortion of the existing statutory and regulatory

scheme . . . [and] arbitrary misapplication of state law." *Id.* at 831.

While acknowledging that "it [was] not impossible to derive a theoretical basis for [the corporation's substantive due process] argument" from certain Supreme Court cases, the court nevertheless observed that

> were such a theory to be accepted, any hope of maintaining a meaningful separation between federal and state jurisdiction in this and many other areas of law would be jettisoned. Virtually every alleged legal or procedural error of a local planning authority or zoning board of appeal could be brought to a federal court on the theory that the erroneous application of state law amounted to a taking of property without due process. Neither Congress nor the courts have, to date, indicated that section 1983 should have such a reach.
>
> [*Ibid.*]

The *Creative* court acknowledged that official misconduct that deprives one of a property interest may rise to the level of a substantive due process violation in limited instances, as when a government body's actions are motivated by racial animus or political or personal bias, but that the corporation in *Creative* had not alleged such abuse. *Id.* at 832 (citing *Progress Dev. Corp. v. Mitchell*, 286 *F.*2d 222 (7th Cir. 1961) (racial animus); *Cordeco Dev. Corp. v. Santiago Vasquez*, 539 *F.*2d 256 (1st Cir.) (personal and political bias), *cert. denied*, 429 *U.S.* 978. *S. Ct.* 488, 50 *L.*

Ed. 2d 586 (1976)). The court concluded its substantive due process analysis by noting that

> [t]he authority cited by [the corporation], as well as other cases, all suggest that the conventional planning dispute — at least when not tainted with fundamental procedural irregularity, racial animus, or the like — which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution. This would be true even were planning officials to clearly violate, much less "distort" the state scheme under which they operate.... Every appeal by a disappointed developer from an adverse ruling by a local ... planning board necessarily involves some claim that the board exceeded, abused or "distorted" its legal authority in some manner, often for some allegedly perverse . . . reason.
>
> [*Id.* at 833 (quotation, citation and footnote omitted).][3]

Other federal circuits have found that when property rights are denied in the course of conventional municipal decisionmaking there is no substantive due process violation.

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3. A corollary to the holding in *Albright v. Oliver, supra*, is that the Supreme Court will presumably use equal protection analysis to resolve racial animus cases in the future.

See Chesterfield Dev. Corp. v. City of Chesterfield, 963 *F.*2d 1102 (8th Cir. 1992) (determining that city's bad-faith violation of state law in enforcing invalid zoning plan against development remains violation of state law and does not give rise to substantive due process violation); *Harding v. County of Door*, 870 *F.*2d 430, 431-32 (7th Cir.) (finding no substantive due process violation when county revoked building permit after construction of housing project had commenced, notwithstanding that state reviewing court had determined the action to be illegal), *cert. denied*, 493 *U.S.* 853, 110 S. *Ct.* 154, 107 *L. Ed.* 2d 112 (1989).

Even though the Rent Leveling Board may have violated its own standards of governance by allowing a member with a demonstrated bias to participate in the hearings, we believe that such governmental action does not give rise to a substantive due process claim.

We acknowledge that the standard that we adopt today may be contrary to a more expansive interpretation given the Due Process Clause by many circuit courts, which have found that "arbitrary or irrational" government actions deny substantive due process rights. *See, e.g., DeBlasio v. Zoning Bd. of Adjustment*, 53 *F.*3d 592, 593 (3d Cir.) (concluding that "in the context of land use regulation, a property owner states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached"), *cert. denied*, __ *U.S.* __, 116 *S. Ct.* 352, 133 *L. Ed.* 2d 247 (1995); *Del Monte Dunes v. City of Monterey*, 920 *F.*2d 1496, 1508 (9th Cir. 1990) (citations omitted) ("[T]o establish their substantive due process claim, appellants must show that the City's decision to deny tentative map approval and to refuse an extension of the conditional use permit was arbitrary and irrational"); *Brady v. Town of Colchester*, 863 *F.*2d 205, 215

(2d Cir. 1988) (declaring that substantive due process assures property owner's right to be free from arbitrary or irrational zoning actions); *Bello v. Walker*, 840 *F.*2d 1124, 1129 (3d Cir.) (determining that substantive due process rights may be violated when municipal council arbitrarily and irrationally interferes with building permit process), *cert. denied*, 488 *U.S.* 851, 109 *S. Ct.* 134, 102 *L. Ed.* 2d 107, *and cert. denied*, 488 *U.S.* 868, 109 *S. Ct.* 176, 102 *L. Ed.* 2d 145 (1988); *Scott v. Greenville County*, 716 *F.*2d 1409, 1419 (4th Cir. 1983) ("Arbitrariness, abuse of discretion, caprice or unfairness giv[e] rise to a constitutional claim [of denial of substantive due process in state permit processing actions]").

It is a mistake, however, to equate the concept of "arbitrary and irrational" governmental land use decisions with the substantive component of the Due Process Clause of the Fourteenth Amendment. In the land use context, the phrases "arbitrary and irrational" or "capricious" are often shorthand expressions for a standard of review that asks whether there are sufficient facts in the record to support the agency's action or whether the agency has followed its legislative mandate. *Bow & Arrow Manor v. Town of West Orange*, 63 *N.J.* 335, 343 (1973).

In *Anastasio v. Planning Bd. of West Orange*, 209 *N.J. Super.* 499, 521-22, *certif. denied*, 107 *N.J.* 46, (1986), the Appellate Division expressly declined to find a due process violation and award damages under § 1983 because a township planning board's rejection of a real estate developer's application for a development plan "was arbitrary and capricious."[4] The *Anastasio* court observed that

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4. We are aware that *Gregg v. Township Comm. of Hazlet*, 232 *N.J. Super.* 34 (App. Div. 1989), suggests that a § 1983 claim arises when a public body abuses its authority. However, *Gregg* did not address the standards for (Cont'd)

> [f]requently in our law a court on an appeal from action of a public agency will determine if the agency acted arbitrarily or capriciously. Accordingly while the words "arbitrary and capricious" may sound harsh, they are simply the standard of appellate review in particular cases.
>
> [*Id.* at 522 (citations omitted).]

See also Silverman v. Rent Leveling Bd., 277 *N.J. Super.* 524, 538 (App. Div. 1994) (agreeing that it would be improper to hold municipal agency liable under § 1983 merely for mistakenly exercising power under state law), *certif. denied*, 139 *N.J.* 443 (1995). It is for this reason that Chief Judge Arnold cautioned that substantive due process protections should be reserved for "truly irrational" governmental abuses that bear no relationship to the merits of the pending matter. Judge Arnold offers as an example of such truly irrational conduct a governmental body that "flips a coin" to make a decision. *Lemke, supra*, 846 *F.*2d at 472 (Arnold, J., concurring). Although Baltarzuk's conduct during the rent proceedings may have violated some state law, it was not "truly irrational." Baltarzuk appears to have mistakenly believed that it was his duty to serve as a tenants' advocate. From this mistaken premise, Baltarzuk's actions were rational. Moreover, all of Baltarzuk's actions were related to the merits of the rent proceeding. The Board's original determinations about the eligibility, as capital improvements, of things such as a "Bob-

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(Cont'd)

establishing a § 1983 due process violation in the land use context because the township had conceded on appeal that plaintiff had established such a violation. *Id.* at 37. Rather, *Gregg* addressed the standards for granting attorney fees under 42 *U.S.C.* § 1988 after a constitutional violation has been established.

Cat" loader were at least debatable. And Baltarzuk was correct that the base rent of one of the tenants was misstated.

We believe that the contrary decisions (giving broad reach to the doctrine of substantive due process) limit their focus to the words of the Supreme Court that the Due Process Clause was "intended to secure the individual from the arbitrary exercise of the powers of government," *Daniels, supra,* 474 *U.S.* at 331, 106 *S. Ct.* at 665, 88 *L. Ed.* 2d at 668 (quotations omitted), without considering the degree of the abuse of power that must be displayed before invoking the substantive component of that particular clause. *Irvine, supra,* 347 U.S. at 133, 74 *S. Ct.* at 383, 98 *L. Ed.* at 569.

"The lower courts' differing approaches to the treatment of substantive due process in these areas suggest the obvious need for Supreme Court clarification." Levinson, *supra,* 16 *U. Dayton L. Rev.* at 318. Until that clarification, however, we seriously doubt that the Supreme Court will find a substantive due process violation to exist when a governmental body denies a property right by conduct that is "arbitrary or irrational" under state law but neither shocking to the conscience of a court in the sense of being a departure from civilized norms of governance, nor offensive to human dignity. *See Rochin, supra,* 342 *U.S.* at 172-174, 72 *S. Ct.* at 210, 96 *L. Ed.* at 190-91.

IV

PROCEDURAL DUE PROCESS

A. *Parratt* Doctrine

Analytically, the Rivkins' case is much closer to a procedural due process claim. Plaintiffs contend that the

presence of a tainted board member deprived them of property, a fair rate of return on their investment, without due process of law. Their case amounts to an allegation that the State failed to furnish an impartial tribunal, which "is a matter of procedural, not substantive, due process." *Holloway v. Walker,* 784 *F.*2d 1287, 1293 (5th Cir.), *cert. denied,* 479 *U.S.* 984, 107 *S. Ct.* 571, 93 *L. Ed.* 2d 576 (1986); *accord Marshall v. Jerrico, Inc.*, 446 *U.S.* 238, 242, 100 *S. Ct.* 1610, 1613, 64 *L. Ed.* 2d 182, 188 (1980) (stating that "requirement of neutrality in adjudicative proceedings safeguards the . . . concerns of procedural due process").

The trial court and Appellate Division found that Baltarzuk tainted the deliberations of the Board by participating in the hearings with a preconceived bias against the Rivkins' application, behaving as an advocate for the tenants during the hearing, and relying on evidence outside the record. *Rivkin, supra,* 277 *N.J. Super.* at 561. Although Baltarzuk maintained that he was not prejudiced and should not have been disqualified, we accept the lower courts' findings for purposes of this appeal. More is required to sustain a claim under 42 *U.S.C.* § 1983, however, than a demonstration that a partial board member participated in the regulatory proceedings. *Parratt, supra,* held that "for a deprivation of property to violate the Due Process Clause of the Fourteenth Amendment it must occur without the opportunity to be heard at a meaningful time and in a meaningful manner." Karen M. Blum, *Applying the* Parratt/Hudson *Doctrine*: *Defining the Scope of the Logan Established State Procedure Exception and Determining the Adequacy of State Postdeprivation Remedies*, 13 *Hastings Const. L.Q.* 695, 698-99 (1986) [hereinafter Blum]. (Parts of *Parratt* not relevant here were overruled by *Daniels v. Williams, supra,* 474 *U.S.* 327, 106 *S. Ct.* 662, 88 *L. Ed.* 2d 662 (1986).) To avoid violating the Due

Process Clause, the State must have afforded the Rivkins a fair hearing on their claims at a meaningful time.

While it is preferable for states to provide a predeprivation hearing whenever practicable, the Supreme Court has "rejected the proposition that 'at a meaningful time and in a meaningful manner' *always* requires the State to provide a hearing prior to the initial deprivation of property." *Parratt, supra*, 451 *U.S.* at 540, 101 *S. Ct.* at 1915, 68 *L. Ed.* 2d at 432 (footnote omitted). At times, for a state to provide any meaningful pre-deprivation process simply may not be possible. Such circumstances arise if a state must take immediate action or if the loss of property is caused by the unpredictable conduct of state officials. *Watts v. Burkhart*, 854 *F.*2d 839, 842 (6th Cir. 1988). The Supreme Court has acknowledged that

> the timing and nature of the required hearing "will depend on the appropriate accommodation of the competing interests involved." These include the importance of the private interest and the length or finality of the deprivation, the likelihood of governmental error, and the magnitude of the governmental interests involved.
>
> [*Logan v. Zimmerman Brush Co.*, 455 *U.S.* 422, 434, 102 *S. Ct.* 1148, 1157, 71 *L. Ed.* 2d 265, 277 (1982) (citations and footnote omitted).]

Post-deprivation remedies are most likely to be deemed satisfactory substitutes for pre-deprivation process when a meaningful pre-deprivation hearing is impracticable, and

property rather than a life or liberty interest is at stake. *See* Blum, *supra*, 13 *Hastings Const. L.O.* at 699-700. *Parratt v. Taylor* illustrates the point. That case involved an inmate at a Nebraska prison who ordered a hobby kit valued at $23.50. The kit was lost after being delivered to the prison. The inmate brought suit in the United States District Court under § 1983, claiming that he had been deprived of his property without due process of law. *Parratt, supra*, 451 *U.S.* at 529, 101 *S. Ct.* at 1910, 68 *L. Ed.* 2d at 425. The district court granted summary judgment in favor of the inmate and the Eighth Circuit affirmed. In reversing these lower court decisions, the Supreme Court asserted that accepting plaintiff's position would turn every alleged injury inflicted by a state official acting under color of law into a violation of the Fourteenth Amendment cognizable under § 1983. *Parratt, supra*, 451 *U.S.* at 544, 101 *S. Ct.* at 1917, 68 *L. Ed.* 2d at 434.

The Supreme Court fit *Parratt* within the framework of cases in which pre-deprivation process was impracticable because the plaintiff was deprived of property as the result of a random and unauthorized act of a state employee. "In such a case, the loss is not a result of some established state procedure and the state cannot predict precisely when the loss will occur." *Id.* at 541, 101 *S. Ct.* at 1916, 68 *L. Ed.* 2d at 432. Thus, an adequate postdeprivation hearing will satisfy the requirements of the Due Process Clause. *Hudson v. Palmer*, 468 *U.S.* 517, 104 *S. Ct.* 3194, 82 *L. Ed.* 2d 393 (1984), reaffirmed *Parratt* and extended this post-deprivation doctrine to cases involving the intentional deprivation of property by a state official. The Court held that an inmate whose personal property was intentionally destroyed by a corrections officer during a search for contraband could not sustain a § 1983 claim because adequate state tort remedies were available to redress the deprivation.

Appendix A

The *Parratt* doctrine does not apply — and predeprivation process is required- when deprivations without procedural fairness are predictable in nature. Frederic S. Schwartz, *The Postdeprivation Remedy Doctrine of* Parratt v. Taylor *and its Application to Cases of Land Use Regulation*, 21 *Ga. L. Rev.* 601, 607 (1987) [hereinafter Schwartz]. In *Logan v. Zimmerman Brush Co.*, 455 *U.S.* 422, 102 *S. Ct.* 1148, 71 *L. Ed.* 2d 265 (1982), plaintiff's employment discrimination claim expired without notice to him when the Illinois Fair Employment Practices Commission failed to convene a fact-finding conference within the 120-day period mandated by Illinois law. Plaintiff brought suit under § 1983, asserting that the state's inaction denied him his constitutional right to due process. The Supreme Court held that the existence of a postdeprivation state remedy — there, an independent tort action — is constitutionally inadequate when the deprivation of property results from an established state procedure. The Court stated:

> It is the state system itself that destroys a claimant's property interest, by operation of law, whenever the Commission fails to convene a timely conference. . . . Logan is challenging not the Commission's error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards.
>
> [*Logan, supra*, 455 *U.S.* at 436, 102 *S. Ct.* at 1158, 71 *L. Ed.* 2d at 278.]

Thus, a threshold question in any procedural due process case is whether the deprivation was caused by random and unauthorized conduct or whether it resulted from an established state procedure.

Appendix A

The Appellate Division held that Baltarzuk's actions as a member of the Rent Leveling Board constituted random and unauthorized conduct within the meaning of the *Parratt* doctrine. That characterization applies to behavior of state officials that is not reasonably anticipated, and therefore cannot practicably be addressed by the provision of pre-deprivation remedies. The Supreme Court's decision in *Zinermon v. Burch*, 494 *U.S.* 113, 110 *S. Ct.* 975, 108 *L. Ed.* 2d 100 (1990), explains the concepts. In *Zinermon*, the Court held that the *Parratt* doctrine did not serve to bar plaintiff's claim that his due process rights were violated when state officials admitted him to a state mental hospital as a voluntary patient even though he was incompetent to give informed consent to his admission. Because the flaw in Florida's procedure (permitting an incompetent to commit himself) was a structural one that the government could clearly anticipate, plaintiff's claim fit within the *Logan* doctrine rather than the *Parratt/Hudson* doctrine. Thus, the availability of postdeprivation process did not serve to defeat plaintiff's § 1983 claim.

The Rivkins maintain that even if Baltarzuk's actions were random and unauthorized, and therefore unpredictable, the Rent Leveling Board's were not. They contend that the Board as policy-maker established the deficient state procedures by permitting Baltarzuk to participate in the hearing even after he had demonstrated an inability to act impartially. This Board conduct would, in their view, obviate the need to conduct a Parratt analysis by placing the case within the *Logan/Zinermon* framework.

Although New Jersey law does proscribe conflicts of interest on the part of public officials, the assumption of our law is that members will disqualify themselves, not that a municipal board will act affirmatively to disqualify its own members.

Appendix A

> Whenever a substantial question is raised as to the disinterestedness of one of several officials sitting on a matter, and the other officials can take care of the case, it usually is just as well for the official in question to withdraw therefrom, so that not the faintest shadow be cast on the integrity of the determination.
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> [*Hochberg v. Freehold Racing Ass'n*, 40 *N.J. Super.* 276, 284 (App. Div. 1956).]

See Griggs v. Princeton Borough, 33 *N.J.* 207, 222 (1960) (setting aside planning board's actions because board member's employer had financial interest in decisions of board). In the Rivkins' case, one Board member did disqualify himself when the Board attorney pointed out a possible conflict. The Board attorney did attempt to chasten Baltarzuk. In response, he stoutly maintained that he was not biased, and was simply conducting a searching investigation of the case — "just asking for correct figures."

Moreover, the available federal precedent does not draw this proffered distinction between Baltarzuk's conduct and the Board's collective conduct and thereby remove the case from the strictures of the *Parratt* doctrine. Recall that in *Logan* the Court stated, "Logan is challenging not the Commission's error, but the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards." *Logan, supra*, 455 *U.S.* at 436, 102 *S. Ct.* at 1158, 71 *L. Ed.* 2d at 278. To hold that the Board's error created an established state procedure would "convert every departure from established administrative procedures into a violation of the Fourteenth Amendment, cognizable under § 1983." *PFZ Properties, supra*, 928 *F.*2d at 31.

Admittedly, the analogy to *Parratt* is not perfect. *Parratt* involved the conduct of a state employee — this case involves the conduct of a public board or body that is, in itself, an organ of state government. Nor does this case involve a denial of a predeprivation hearing — there was a pre-deprivation hearing but that hearing was flawed. Still we believe that the analogy to *Parratt* is appropriate. "The requirements of procedural due process are 'norms addressed to legal systems as a whole rather than to individual government actors.' " Schwartz, *supra*, 21 *Ga. L. Rev.* at 611 (quoting Laurence H. Tribe, *American Constitutional Law* § 18-4, at 1162 n.15 (1st ed. 1978)). "Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate." *Zinermon, supra*, 494 *U.S.* at 126, 110 *S. Ct.* at 983, 108 *L. Ed.* 2d at 114. We must look at the legal system as a whole.

Amicus Hudson County Taxpayers' Association acknowledges that most municipal boards are comprised of inexpert, part-time laypersons who operate in a highly charged political atmosphere. As a result, judicial review is an integral part of the State's governance of its local boards and bodies. For reasons discussed more fully in Part B hereof, the New Jersey Constitution guarantees government under law at the local level. This is especially true in the context of land use law in which judicial review ensures full accountability. The qualitative difference between procedural unfairness in a case such as this and that in *Logan* and *Zinermon* is that the state action in those cases was both institutional (the procedures were built-in) and final (in *Logan*, plaintiff's lawsuit "was forever barred"; in *Zinermon*, the patient's liberty was irretrievably lost).

And even though the ordinance creating the Rent Leveling

Board calls for the participation of a tenant representative, this State system itself neither caused the deprivation of the Rivkins' property nor itself amounts to a per se violation of the Rivkins' procedural due process rights. In fact, the ordinance requires the Board to base its determination on the reasonable, credible evidence before it. Rather, it was the unpredictable behavior of the tenant representative, which went well beyond the bounds contemplated by the ordinance, that spawned the Rivkins' problems. When Baltarzuk tainted the Board's proceedings by behaving as a tenant advocate and introducing evidence from outside the record, he was acting on his own initiative without State authorization. The State is not required to anticipate random and unauthorized violations of its own constitutionally adequate procedures. *PFZ Properties, supra,* 928 *F.*2d at 31. Nor may a state effectively anticipate random and unauthorized violations of established state procedures by its lesser boards or bodies in the land use context. Thus, the deprivation—the delay in receiving a fair rental allowance — will not be deemed to be in violation of the Due Process Clause if adequate postdeprivation remedies were available to the Rivkins. *Parratt, supra,* 451 *U.S.* at 539, 101 *S. Ct.* at 1915, 94 *L. Ed.* 2d at 431.

B. Adequacy of Plaintiffs' Remedy

The post-deprivation remedy that the State furnished to the Rivkins was an action in lieu of prerogative writs. The 1947 New Jersey Constitution preserved the substance of common law prerogative writ review by permitting parties to seek "review, hearing and relief" in the Superior Court of all actions of municipal agencies. *N.J. Const.* art. VI, § 5, ¶ 4. New Jersey Court *Rule* 4:69 implements this constitutional provision. A court may set aside a municipal board decision if it is shown to be arbitrary, capricious or unreasonable, not supported in the

evidence, or otherwise contrary to law. *Reid v. Township of Hazlet*, 198 *N.J. Super.* 229 (App. Div.), *certif. denied*, 101 *N.J.* 262 (1985); *Green Acres of Verona v. Borough of Verona*, 146 *N.J. Super.* 468, 470 (App. Div. 1977).

Plaintiffs contend that the action in lieu of prerogative writs is not an adequate remedy because it does not enable them to recover damages, attorney's fees or costs. In *Parratt*, the Court concluded, "Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process." *Parratt, supra*, 451 *U.S.* at 544, 101 *S. Ct.* at 1917, 68 *L. Ed.* 2d at 434. *Accord Ayers v. Jackson Township*, 202 *N.J. Super.* 106, 128-29 (App. Div. 1985) ("[A] state remedy may be sufficient, even if not as complete as that allowed under 42 *U.S.C.* § 1983."), *aff'd in part and rev'd in part*, 106 *N.J.* 557 (1987).

Plaintiffs' action in lieu of prerogative writs provided an adequate state post-deprivation remedy as required by the *Parratt* doctrine. The remedies provided were quite complete. After reviewing the proceedings and decision of the Rent Leveling Board, the trial court found that Baltarzuk's improper conduct had prejudiced the Rivkins. The court remanded for a new hearing and barred Baltarzuk from participating in the case. After rehearing the matter, the Board awarded plaintiffs an additional $25,089.67 in qualifying capital improvements. The total of the two sums approved by the Board amounted to 77 per cent of the Rivkins' original request. The additional rent increase redressed all of the economic claims that plaintiffs possessed. In a second prerogative writ action, the trial court upheld the action of the Dover Board as a fair and reasonable assessment of the

proofs. As the Third Circuit concluded in a case in which plaintiff ultimately received its desired dance hall license through the appeal process, "[D]elay alone does not [ordinarily] create a procedural due process violation." *Midnight Sessions Ltd. v. City of Philadelphia*, 945 *F.*2d 667, 682 (3d Cir. 1991), *cert. denied*, 503 *U.S.* 984, 112 *S. Ct.* 1668, 118 *L. Ed.* 2d 389 (1992).

The remaining question is whether the absence of a specific provision authorizing attorney's fees to prevailing parties in prerogative writ actions causes the state remedy to be constitutionally inadequate. *Parratt* makes clear that state remedies need not provide all the relief that would have been available if the plaintiff were successful under § 1983. Thus, the state remedies would not be considered inadequate simply because they did not allow for the recovery of attorney's fees. *Weimer v. Amen*, 870 *F.*2d 1400, 1405 (8th Cir. 1989); *Wilson v. Beebe*, 770 *F.*2d 578, 584 (6th Cir. 1985).[5]

In addition, New Jersey has recently increased judicial authority to allow counsel fees to the prevailing party in a civil action. *N.J.S.A.* 2A:15-59.1. While we do not decide the issue in this case, it appears a permissible interpretation to conclude that a court may award counsel fees to the prevailing party when a local board "without any reasonable basis in law or equity" refuses to accede to a clearly meritorious appeal. *Ibid.* A proposed Rule of Court would supplement the relief provided in

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5. This case illustrates again the "difficulty that local agencies and reviewing courts have experienced in the administration of rent control ordinances." *Mayes v. Jackson Township Rent Leveling Bd.*, 103 *N.J.* 362, 376 (1986), *cert. denied*, 479 *U.S.* 1090, 107 *S. Ct.* 1300, 94 *L. Ed.* 2d 155 (1987). A system of laws under which a party spends over $50,000 in legal fees to obtain a $59,000 rent adjustment seems a poor method of protecting the public. (The trial court allowed only $39,000 of those fees.)

the statute. *See Proposed Rule Amendment on Frivolous Litigation*, 143 *N.J.L.J.* 370 (Jan. 29, 1996).

Because the State provided an adequate post-deprivation remedy to redress the aberrant conduct of the board member or the Board, plaintiffs' rights to procedural due process were not violated. Therefore, plaintiffs cannot sustain an action on that basis for damages and attorney's fees under § 1983.

V

EQUAL PROTECTION

We here come to the analysis that may best reflect the core values of 42 *U.S.C.* § 1983. Obviously, claimants may not escape the teaching of *Parratt* and *Hudson* by relabeling procedural due process claims as equal protection claims. In his concurring opinion in *Albright*, Justice Kennedy cautioned against allowing *Parratt* to be diluted and, in some respects, circumvented by such pleading exercises. *Albright, supra*, 510 *U.S.* at __, 114 *S. Ct.* at 819, 127 *L. Ed.* 2d at 131.

> It is not enough simply to give these state law claims labels such as "due process" or "equal protection" in order to raise a substantial federal question under section 1983. As has been often stated, "[t]he violation of a state statute does not automatically give rise to a violation of rights secured by the Constitution."
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> [*Creative Environments, supra*, 680 *F.*2d at 833 (citations omitted).]

Section 1983's powerful remedy should be reserved for claims involving "gross abuse of power, invidious discrimination, or fundamentally unfair procedures." *Id.* at 832 n.9. Proving a deprivation of equal protection rights in a dispute with a municipal agency requires a distinct measure of proof. The majesty of the Equal Protection Clause should not be invoked every time that applications are incorrectly denied by a municipal agency.

> If disgruntled permit applicants could create constitutional claims merely by alleging that they were treated differently from a similarly situated applicant, the correctness of virtually any state permit denial would become subject to litigation in federal court. Limiting such claims is essential to prevent federal courts from turning into "zoning board[s] of appeals." *Village of Belle Terre v. Boraas*, 416 *U.S.* 1, 12, 94 *S. Ct.* 1536, 1542, 39 *L. Ed.* 2d 797 (1974) (Marshall, J., dissenting).
>
> [*Nestor Colon Medina & Sucesores Inc. v. Custodio*, 964 *F.*2d 32, 44-45 (1st Cir. 1992).]

Ordinarily, an equal protection plaintiff must be singled out because of membership in a class and cannot be just the victim of a random act of governmental incompetence. Furthermore, "the state's act of singling out an individual for differential treatment does not itself create the class [as that] would make . . . every arbitrary act of government[ ] a violation of the Constitution." *Albright v. Oliver*, 975 *F.*2d 343, 348 (7th Cir. 1992), *aff'd on other grounds*, 510 *U.S.* __, 114 *S. Ct.* 807, 127 *L. Ed.* 2d 114

(1994). Therefore, successful equal protection claimants usually demonstrate purposeful discrimination based on membership in a protected class, such as race. For example, in *Wilson v. City of North Little Rock*, 801 *F.*2d 316 (8th Cir. 1986), the court reinstated plaintiff's equal protection claim against police officers who allegedly set up roadblocks and harassed black patrons of plaintiff's roller skating rink. *See also Watts v. Burkhart, supra*, 854 *F.*2d at 849 (Nelson, J., concurring) ("To turn the laws against a person because of his race, as the [medical] board members are said to have done here, is to deny that person the equal protection of the laws. . . . ").

Similarly, discrimination on the basis of political beliefs may give rise to a First Amendment claim. *See Elrod v. Burns*, 427 *U.S.* 347, 96 *S. Ct.* 2673, 49 *L. Ed.* 2d 547 (1976) (government interference with property right in form of one's employment in retaliation for exercise of one's First Amendment rights is actionable under § 1983).

VI

CONCLUSION

To sum up, the Act of 1871 was a response to a profound breakdown in state government. Congress guaranteed by Section 1 of the Act that every person should have a federal remedy for failure of any state actor to afford a person the rights, privileges and immunities secured by the Constitution and laws of the United States.

Among the rights secured by the Fourteenth Amendment is that no state shall deprive a person of property without due process of law, nor deny to that person the equal protection of the

laws. In the setting of municipal land use controversies, our State has well established procedures, including judicial review of municipal governance, to assure government under law. *See Pizzo Mantin Group v. Township of Randolph,* 137 *N.J.* 216 (1994) (holding that municipal government may not exercise unguided developmental powers but must incorporate standards of decision in duly-enacted ordinances).

We are satisfied that the principles of *Parratt* and *Hudson* provide an appropriate basis for concluding that plaintiffs were not deprived of property without the due process of law guaranteed by the Fourteenth Amendment. Generally, litigants need not exhaust their state administrative or judicial remedies before bringing a § 1983 claim. *Patsy v. Florida Bd. of Regents,* 457 *U.S.* 496, 102 *S. Ct.* 2557, 73 *L. Ed.* 2d 172 (1982); *Monroe v. Pape, supra,* 365 *U.S.* 167, 81 *S. Ct.* 473, 5 *L. Ed.* 2d 492 (1961). However, as applied to municipal land use cases, the *Parratt* doctrine is an analog to the familiar doctrine of ripeness. In *Williamson Planning Comm'n v. Hamilton Bank,* 473 *U.S.* 172, 195, 105 *S. Ct.* 3108, 3121, 87 *L. Ed.* 2d 126, 144 (1985), the Court stated, "The recognition that a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation is analogous to the Court's holding in *Parratt.*" Unlike other constitutional violations that are complete at the moment they occur, a deprivation of property without procedural due process does not arise until the plaintiffs are actually denied appropriate procedures for redress in the state system. *Gilmere v. City of Atlanta,* 774 *F.*2d 1495, 1499 (11th Cir. 1985) (citing *Parratt, supra,* 451 *U.S.* at 541-44, 101 *S. Ct.* at 1916-17), *cert. denied,* 476 *U.S.* 1115, 106 *S. Ct.* 1970, 90 *L. Ed.* 2d 654 (1986). In *MacDonald, Sommer & Frates v. Yolo County,* 477 *U.S.* 340,

348, 106 *S. Ct.* 2561, 2566, 91 *L. Ed.* 2d 285, 294 (1986), the Court held that a planning commission's decision to deny plaintiff's subdivision proposal may amount to a taking if it goes "too far," but said that a court "cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." By analogy, the claim that property has been taken by a rent leveling board without procedural due process cannot be known until the process is complete.

We are thus satisfied that the *Parratt* doctrine provides an appropriate basis for dismissing plaintiffs' procedural due process claim. Professor Fallon suggests that it would be preferable to view "*Parratt* as implementing a species of abstention doctrine [because it] would put the arguments for requiring litigants to proceed in state court into honest view, where they could be evaluated by commentators and by Congress." Richard H. Fallon, *Some Confusions About Due Process Judicial Review and Constitutional Remedies*, 93 *Colum. L. Rev.* 309, 345-46 (1993) (footnote omitted). As it stands now, "[t]he common sense teaching of *Parratt* is that some questions of property, contract, and tort law are best resolved by state legal systems without resort to the federal courts, even when a state actor is the alleged wrongdoer. " *Albright, supra*, 510 *U.S.* at __, 114 *S. Ct.* at 818, 127 *L. Ed.* 2d at 130 (Kennedy, J., concurring). So long as state legal systems remain committed to principles of equal justice and provide plain and adequate remedies to prevent unconstitutional deprivations of property, there is no occasion for plaintiffs to seek redress in federal court or under federal law. Unless a substantial federal question is shown, land use decisions should "properly rest with the community that is ultimately — and intimately — affected." *Gardner v. Baltimore Mayor & City Council*, 969 *F.*2d 63, 68 (4th Cir. 1992).

When, however, a government agency has engaged in egregious misconduct rising to the level of a substantive due process violation or has invidiously discriminated against a member of society, a § 1983 violation occurs "regardless of the fairness of the procedures used to implement" the abuse. *Daniels v. Williams, supra,* 474 *U.S.* at 331, 106 *S. Ct.* at 665, 88 *L. Ed.* 2d at 668. Very often, conduct of that nature may violate other provisions of the federal Civil Rights Act, such as 42 *U.S.C.* § 1981, or our own Law Against Discrimination, *N.J.S.A.* 10:5-1 to 10:5-42. In this case, the conduct of Mr. Baltarzuk may have been ill-tempered, or even rude, but there is not a shred of evidence that he bore any resentment against the Rivkins on account of political, racial or religious affiliations. The grievances between the Rivkins and Baltarzuk and the Board, as in almost every such local controversy, were all economic. Perhaps Baltarzuk's disqualification should have occurred at an earlier stage. Still, disputes about the regularity of state procedures do not represent the type of egregious conduct that rises to the level of a substantive due process violation.

In *Fair Assessment in Real Estate v. McNary,* 454 *U.S.* 100, 102 *S. Ct.* 177, 70 *L. Ed.* 2d 271 (1981), the principles of which infuse our decision today in *General Motors v. Linden, supra,* Justice Rehnquist wrote:

> To allow such suits [§ 1983 actions for improper tax assessments] . . . merely on the assertion that the tax collected was willfully and maliciously discriminatory against a certain type of property . . . would result in this Court being a source of appellate review of all state property tax classifications.
>
> . . . .

> [Such interference with state systems would be contrary to] the scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts.
>
> . . . .
>
> [Aggrieved parties] must seek protection of their federal rights by state remedies, provided . . . that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court.
>
> [*Id.* at 114-16, 102 *S. Ct.* at 185-86, 70 *L. Ed.* 2d at 282-83 (quotations, citations and footnote omitted).]

Of course, as do we, Justice Rehnquist excepted from this categorization cases of invidious discrimination based upon classifications such as race. *Id.* at 107 n. 4, 102 *S. Ct.* at 181 n. 4, 70 *L. Ed.* 2d at 278 n. 4.

The judgment of the Appellate Division is affirmed.

CHIEF JUSTICE WILENTZ and JUSTICES HANDLER, POLLOCK, GARIBALDI, STEIN and COLEMAN join in JUSTICE O'HERN's opinion.

APPENDIX B — OPINION AND DECISION OF THE SUPERIOR COURT OF NEW JERSEY FOR THE APPELLATE DIVISION DATED DECEMBER 8, 1994

649 A.2d 1356

DAVID RIVKIN, EDWARD RIVKIN, JUDITH RIVKIN, T/A GALAXY MANOR, A NEW JERSEY PARTNERSHIP, PLAINTIFFS-RESPONDENTS AND CROSS-APPELLANTS, v. DOVER TOWNSHIP RENT LEVELING BOARD, DEFENDANT-APPELLANT AND CROSS-RESPONDENT.

Superior Court of New Jersey
Appellate Division

Argued October 5, 1994 Decided December 8, 1994.

* * *

Before Judges KING, D'ANNUNZIO and EICHEN.

Courtland T. Babcock, II, argued the cause for appellant/cross-respondent (*Babcock, Hennes & Bielory*, attorneys; *Mr. Babcock* on the brief).

Reuel E. Topas argued the cause for respondents/cross-appellants (*Levin, Shea, Pfeffer, McMahon* and *Russell*, attorneys; *Mr. Topas*, on the brief).

The opinion of the court was delivered by

D'ANNUNZIO, J.A.D.

The issue is whether defendant deprived plaintiffs of procedural due process, thereby subjecting defendant to liability for compensatory damages and counsel fees.

Appendix B

Galaxy Manor, a partnership, operates a mobile home park in Dover Township. In May 1990, it filed an application for a rent increase with defendant Dover Township Rent Leveling Board (Board or defendant). The application was based on major capital improvements to the park, allegedly in the amount of $59,624.96. The Board conducted hearings and rendered its decision in October 1990, permitting rent increases based on capital improvements in the amount of $20,641.42.

Plaintiffs, the partners in Galaxy, filed this action in lieu of prerogative writs, contending that the defendant's determination was arbitrary and capricious and alleging a violation of their civil rights contrary to 42 *U.S.C.A* § 1983.[1] The core of plaintiffs' allegations focused on the behavior of Edward Baltarzuk, a member of the Board. Plaintiffs contended that Baltarzuk participated in the hearings with a preconceived bias against their application, behaved as an advocate for the tenants during the hearing, relied on evidence outside the record and poisoned the deliberations of the Board.

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1. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Appendix B

In the prerogative writ aspect of plaintiffs' case, the trial court ruled that Baltarzuk had prejudiced plaintiffs. The court set aside the Board's determination, remanded for a new hearing and barred Baltarzuk from participating as a Board member at the new hearing. On remand, the Board allowed an additional $25,089.67 in qualifying capital improvements.

Based on a finding that Baltarzuk's behavior had violated plaintiffs' civil rights contrary to § 1983, the court awarded counsel fees to plaintiffs pursuant to 42 *U.S.C.A.* § 1988 in the amount of $39,679.55. The court also awarded plaintiffs compensatory damages in the amount of $6,303.34, representing interest on the difference between the initial rent increase and the larger rent increase awarded as a result of the hearing on remand. Defendant appealed, and plaintiffs cross-appealed.

Plaintiffs contended, and the trial court agreed, that Baltarzuk's performance as a Board member deprived them of procedural due process. *See Marshall v. Jerrico, Inc.*, 446 *U.S.* 238, 242, 100 *S.Ct.* 1610, 1613, 64 *L.Ed.*2d 182, 188 (1980) (entitlement to an impartial tribunal is a procedural due process right). We conclude that even if Baltarzuk's behavior deprived plaintiffs of due process, plaintiffs had an adequate postdeprivation remedy under State law and, therefore, § 1983 was not violated.

Parratt v. Taylor, 451 *U.S.* 527, 101 *S.Ct.* 1908, 68 *L.Ed.*2d 420 (1981)[2] involved a claim by a Nebraska inmate that prison

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2. In *Daniels v. Williams*, 474 *U.S.* 327, 106 *S.Ct.* 662, 88 *L.Ed.*2d 662 (1986), the Supreme Court partially overruled *Parratt* when it held that "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty or property." *Id.* at 328, 106 *S.Ct.* at 663, 88 *L.Ed.*2d at 666. *Accord Davidson v. Cannon*, 474 *U.S.* 344, 106 *S.Ct.* 668, 88 *L.Ed.*2d 677 (1986).

officials negligently lost a hobby kit he had ordered by mail. Plaintiff contended that he had been deprived of his property without due process of law in violation of § 1983. The district court's judgment in plaintiff's favor was affirmed by the United States Court of Appeals.

The Supreme Court rejected Nebraska's contention that only an intentional deprivation of property would support a § 1983 claim. The Court focused on whether plaintiff had "suffered a deprivation of property without due process of law. In particular, we must decide whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations satisfy the requirements of procedural due process." *Id.* at 537, 101 *S.Ct.* at 1914, 68 *L.Ed.*2d at 430.

In resolving this issue, the Court noted that deprivation of a property or liberty interest pursuant to an established state procedure usually has required a predeprivation hearing. *See Fuentes v. Shevin*, 407 *U.S.* 67, 92 *S.Ct.* 1983, 32 *L.Ed.*2d 556 (1972); *Bell v. Burson*, 402 *U.S.* 535, 91 *S.Ct.* 1586, 29 *L.Ed.*2d 90 (1971); *Mullane v. Central Hanover Trust Co.*, 339 *U.S.* 306, 70 *S.Ct.* 652, 94 *L.Ed.* 865 (1950). The Court, however, also observed that in some circumstances the availability of a postdeprivation remedy can satisfy the Due Process Clause. *Parratt, supra*, 451 *U.S.* at 538, 101 *S.Ct.* at 1914, 68 *L.Ed.*2d at 430-31. *See Ewing v. Mytinger & Casselberry, Inc.*, 339 *U.S.* 594, 70 *S.Ct.* 870, 94 *L.Ed.* 1088 (1950) (summary seizure and destruction of drugs); *Fahey v. Mallonee*, 332 *U.S.* 245, 67 *S.Ct.* 1552, 91 *L.Ed.* 2030 (1947) (immediate seizure of property in light of substantial question regarding the competence of a bank's officers); *North America Cold Storage Co. v. Chicago*, 211 *U.S.* 306, 29 *S.Ct.* 101, 53 *L.Ed.* 195 (1908) (seizure and destruction of unwholesome food without a prior hearing). The

Court noted that, in these cases, exigency or "the impracticality of providing any meaningful predeprivation process can, when coupled with the availability of some meaningful" postdeprivation review satisfy the requirement of procedural due process. *Parratt, supra*, 451 *U.S.* at 639, 101 *S.Ct.* at 1916, 68 *L.Ed.*2d at 431.

Presaging its ruling on plaintiff-inmate's claim, and in terms peculiarly applicable to the present case, the Court stated:

> The justifications which we have found sufficient to uphold takings of property without any predeprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee. In such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State as action under "color of law," is in almost all cases beyond the control of the State. Indeed, in most cases it is not only impracticable, but impossible to provide a meaningful hearing before the deprivation. That does not mean, of course, that the State can take property without providing a meaningful postdeprivation hearing. The prior cases which have excused the prior-hearing

> requirement have rested in part on the availability of some meaningful opportunity subsequent to the initial taking for a determination of rights and liabilities.
>
> [*Id* at 541, 101 *S.Ct.* at 1916, 68 *L.Ed.2d* at 482.]

Applying those principles, the Court concluded that the inmate did not state a valid claim under § 1983 because the deprivation resulted from an unauthorized failure of corrections officials to follow established state procedure, and Nebraska provided a postdeprivation remedy under its tort claims procedure. *Id* at 543, 101 *S.Ct.* at 1917, 68 *L.Ed.*2d at 434.

In *Hudson v. Palmer*, 468 *U.S.* 617, 104 *S.Ct.* 3194, 82 *L.Ed.*2d 393 (1984), the Court reaffirmed Parratt and extended it to an intentional deprivation of property. The Court stated:

> While Parratt is necessarily limited by its facts to negligent deprivations of property, it is evident, as the Court of Appeals recognized, that its reasoning applies as well to intentional deprivations of property. The underlying rationale of Parratt is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply 'impracticable' since the state cannot know when such deprivations will occur. We can discern no logical distinction between negligent and intentional deprivations of property insofar as the 'practicability' of

> affording predeprivation process is concerned. The state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct.
>
> [*Id.* at 533, 104 *S.Ct.* at 3203, 82 *L.Ed.*2d at 407.]

The Court refined the application of *Parratt-Hudson* principles in *Zinermon v. Burch*, 494 *U.S.* 113, 110 *S.Ct.* 975, 108 *L.Ed.*2d 100 (1990). Plaintiff, Burch, had executed required documents admitting him to a Florida hospital for treatment of mental illness. Under Florida statutes, a person may be admitted as a voluntary patient based on his " '[e]xpress and informed consent' " which is defined as " 'consent voluntarily given in writing after sufficient explanation and disclosure . . . to enable the person . . . to make a knowing and willful decision.' " *Id.* at 123, 110 *S.Ct.* at 982, 108 *L.Ed.*2d at 112. Burch was admitted as a voluntary patient though his condition and behavior on admission could have supported an inference that he was not competent to make a knowing and willful decision regarding admission. He also executed consents to treatment. Burch remained at the hospital for five months, and during that time no hearing was held regarding his status.

Burch commenced an action under § 1983, alleging a deprivation of liberty without procedural due process, *i.e.*, the procedural safeguards available under Florida law utilized in cases of involuntary commitments. The district court dismissed the complaint for failure to state a claim, and the United States Court of Appeals reversed. The issue was whether the *Parratt*

holding, that the availability of a postdeprivation remedy satisfied due process, applied to Burch's claim.

The Supreme Court rejected Burch's contention that *Parratt* applied only to deprivations of property. The Court ruled that the involvement of a deprivation of liberty "does not automatically preclude application of the Parratt rule." *Id.* at 132, 110 *S.Ct.* at 987, 108 *L.Ed.*2d at 118. The Court narrowed the issue to the following question: "whether predeprivation procedural safeguards could address the risk of deprivations of the kind Burch alleges." *Ibid.*

The Court answered the question in the affirmative. The Court noted that Florida statutes "do not direct any member of the facility staff to determine whether a person is competent to give consent, nor to initiate the involuntary placement procedure for every incompetent patient." *Id* at 135, 110 *S.Ct.* at 988, 108 *L.Ed.*2d at 120. Because it is foreseeable that a person seeking treatment for mental illness might not be competent to consent to admission, the Court criticized the absence of a procedure to determine competency, and observed that, unlike *Parratt* and *Hudson*, there is a predictable point in the admissions procedure when a deprivation of liberty will occur, if at all. *Id.* at 136, 110 *S.Ct.* at 989, 108 *L.Ed.*2d at 121. The Court concluded by stating:

> Unlike Parratt and Hudson, this case does not represent the special instance of the . . . due process analysis where postdeprivation process is all that is due because no predeprivation safeguards would be of use in preventing the kind of deprivation alleged.
>
> [*Id.* at 139, 110 *S.Ct.* at 990, 108 *L.Ed.*2d at 122.]

The Court affirmed the reversal of the order dismissing Burch's complaint.[3]

The Court also found the *Parratt* rule to be inapplicable in *Logan v. Zimmerman Brush Co.*, 455 *U.S.* 422, 102 *S.Ct.* 1148, 71 *L.Ed.*2d 266 (1982). Logan had filed an employment discrimination claim with the Illinois Fair Employment Practice Commission (Commission). Under an Illinois statute, the Commission had 120 days to hold a factfinding conference, but the Commission's staff convened the conference five days beyond the 120 day period. The Illinois Supreme Court determined that the Commission's failure to comply with the statute deprived the Commission of jurisdiction to adjudicate Logan's claim and, therefore, rejected Logan's contention that termination of his claim, because of the Commission's failure to comply with the statute, violated his right to due process.

The United States Supreme Court determined that Logan's cause of action against his former employer was a constitutionally protected interest which could not be extinguished by the state without a hearing on the merits. The Court declared:

> Logan's interests in retaining his employment, in disproving his employer's charges of incompetence or inability, and —

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3. Justice O'Connor dissented joined by the Chief Justice and Justices Scalia and Kennedy. They believed that *Parratt* applied because the gist of Burch's complaint was that a wanton and unauthorized departure from established practice caused the deprivation. The dissent accused the majority of transforming that allegation into a challenge to the adequacy of Florida's admission procedures. *Id.* at 140-41, 110 *S.Ct.* at 991-92, 108 *L.Ed.*2d at 123-24.

> more intangibly — in redressing an instance of alleged discrimination, are all substantial. At the same time, the deprivation here is final; Logan, unlike a claimant whose charge is dismissed on the merits for lack of evidence, cannot obtain judicial review of the Commission action. A system or procedure that deprives persons of their claims in a random manner, . . . necessarily presents an unjustifiably high risk that meritorious claims will be terminated. And the State's interest in refusing Logan's procedural request is, on this record, insubstantial.
>
> [*Id.* at 434-35, 102 *S.Ct.* at 1157, 71 *L.Ed.*2d at 277.]

The Court rejected application of the *Parratt* rule, though the employer contended that Logan was the victim of a negligent deprivation and, therefore, a postdeprivation remedy against the state for damages under the appropriate Illinois statute would satisfy due process. The Court distinguished *Parratt* on the ground that Logan's loss resulted from "the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference — whether the Commission's action is taken through negligence, maliciousness, or otherwise." *Id.* at 436, 102 *S.Ct.* at 1158, 71 *L.Ed.* 2d at 278.

In the present case, the threshold issue is whether Baltarzuk's actions as a sitting member of the Board constituted random and unauthorized conduct within the *Parratt-Hudson*

doctrine or whether they fall within the *Zinermon-Logan* orbit. The ordinance creating the Board complicates resolution of the issue. The ordinance establishes a five member Board, "of whom one (1) shall be a mobile homes park landlord and one (1) a tenant of a mobile homes park. The Chairman shall be chosen . . . from among the nonlandlord/nontenant members." It could be argued that Baltarzuk's adversarial posture as a tenant representative is built into the rent adjustment scheme and, therefore, as in *Logan*, plaintiff's deprivation of due process was part of the "state" system. Thus, the deprivation would not be the result of a random and unauthorized act.

We reject the argument. Although the ordinance requires landlord and tenant representation on the Board, we are persuaded that the role of those special interest representatives, as established in the ordinance, does not include adversarial participation at the hearing or the presentation of, or reliance on, evidence gathered by them outside the record. The ordinance specifies that the "Board shall give both the landlord and tenant reasonable opportunity to be heard before making any determination and shall base its determination on the reasonable, credible evidence before it," thereby precluding use of any outside information gathered by any Board member.

The role of the landlord/tenant representatives on the Board is analogous to the role of party-designated arbitrators sitting with a neutral arbitrator. Defining that role in *Barcon Associates v. Tri-County Asphalt Corp.*, 86 *N.J.* 179, 430 *A.*2d 214 (1981), our Supreme Court stated:

> While a party-designated arbitrator may approach the arbitration proceedings with some sympathy for the position of the party

> designating him, such an arbitrator must remain faithful to the obligation which rests upon him to maintain 'broad public confidence in the integrity and fairness of the [arbitration] process.' [Holtzmann, *The First Code of Ethics for Arbitrators in Commercial Disputes*, 33 *The Business Lawyer* 309, 312 (1977)]. Thus, *all* arbitrators should 'conduct the proceedings in an evenhanded manner and treat all parties with equality and fairness at all stages of the proceedings.' *Id.* at 316. Most important, arbitrators 'should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.' *Id.* at 317.
>
> [*Id.* at 190, 430 *A.*2d 214.]

Accord American Eagle Fire Ins. Co. v. New Jersey Ins. Co., 240 *N.Y.* 398, 405, 148 *N.E.* 562, 564 (1925). These principles are especially applicable when the adjudicating body is a public agency.

We conclude that Baltazuk unilaterally assumed a role not authorized in the ordinance and that his behavior was random, not reasonably to be anticipated, and not pursuant to an established state procedure or custom. *See Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 830 *F.*2d 977, 983 (9th Cir.1987), *cert. denied*, 488 *U.S.* 827, 109 *S.Ct.* 79, 102 *L.Ed.*2d 55 (1988) (*Parratt* rule applicable to due process violation occasioned by county supervisor voting in matter in which he had a conflict of interest); *Holloway v. Walker*, 784 *F.*2d 1287, 1291-93 (5th Cir.1986) (*Parratt* rule applicable to alleged

conspiracy between trial judge and other litigants to deprive adverse litigants of their rights and property). As in *Parratt*, the state could not have provided a meaningful hearing designed to predict the behavior of one of the Board members. *Logan*, *supra*, and *Zinermon*, *supra*, are, therefore, distinguishable. *Logan* involved the automatic loss of a claim, though the triggering act was a state employee's failure to adhere to the mandated time limits. The loss was the proximate consequence of adherence to a state procedural remedy regardless of the source of the delay. *Zinermon*, unlike the present case, involved a foreseeable deprivation at a point in time, admission to the hospital, where it was practical for the state to provide a mechanism to determine the competency of voluntary admittees. Plaintiffs reliance on *Gregg v. Township Comm. of Tp. of Hazlet*, 232 *N.J.Super.* 34, 666 *A.*2d 348 (App.Div.1989), is misplaced. The only issue this court addressed in Gregg was whether plaintiffs were entitled to counsel fees under § 1988 in light of a "conceded" violation of § 1983. *Id.* at 37, 556 *A.*2d 348.

We also conclude that New Jersey provides a meaningful postdeprivation remedy. In New Jersey, the actions of municipal agencies are subject to review in the Superior Court, Law Division, in an action in lieu of prerogative writs.[4] *See generally Alexander's v. Borough of Paramus*, 125 *N.J.* 100, 107-08, 592 *A.*2d 1168 (1991); *In re LiVolsi*, 85 *N.J.* 576, 592-94, 428 *A.*2d 1268 (1981). The trial court's review of the agency action is based on the record below, and the agency's determination is set aside if it is arbitrary, capricious or unreasonable, not supported

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4. The prerogative writs are *certiorari*, *quo warranto*, *prohibition* and *mandamus*. They were superseded by the New Jersey Constitution in 1947 which provided for "review, hearing and relief" in the Superior Court in lieu of the superseded writs. *N.J. Const.* art. VI, § 5, ¶ 4.

in the evidence, or otherwise contrary to law. *See Reid v. Township of Hazlet*, 198 *N.J.Super.* 229, 486 *A.*2d 940 (App.Div.), *certif. denied*, 101 *N.J.* 262, 501 *A.*2d 931 (1985); *Green Acres of Verona v. Borough of Verona*, 146 *N.J.Super.* 468, 470, 370 *A.*2d 63 (App.Div. 1977); *see also, Harry's Village, Inc. v. Egg Harbor Tp.*, 89 *N.J.* 576, 587-88, 446 *A.*2d 862 (1982).

The review of agency determinations afforded in actions in lieu of prerogative writs is a more effective postdeprivation remedy than the postdeprivation tort claims that were available to the plaintiffs in *Parratt* and *Hudson*. *See Anastasio v. Planning Bd. of Tp. of West Orange*, 209 *N.J.Super.* 499, 522, 507 *A.*2d 1194 (App.Div.); *certif. denied*, 107 *N.J.* 46, 526 *A.*2d 136 (1986). The tort remedy is indirect; it redresses the violation of a plaintiff's rights with a payment of money. The action in lieu of prerogative writs provides a direct remedy; it substantially restores the status quo by overturning the agency ruling that was the fruit of the due process deprivation. *See Holloway v. Walker*, *supra*, 784 *F.*2d at 1292 (right of appeal from determination of allegedly corrupt judge was an adequate postdeprivation remedy); *cf. Lake Nacimiento Ranch*, *supra*, 830 *F.*2d at 983-84 (action for damages under California statute where an official participates in a governmental decision despite his financial interest is an adequate postdeprivation remedy under *Parratt*).

To recapitulate, Baltarzuk's actions were random and unauthorized, and the state provided an adequate postdeprivation remedy. Consequently, plaintiffs received all the process to which they were entitled and, therefore, defendant Board did not deprive plaintiff of due process. *Parratt*, *supra*, 451 *U.S.* at 544, 101 *S.Ct.* at 1917, 68 *L.Ed.*2d at 434; *Hudson*, *supra*, 468 *U.S.* at 536, 104 *S.Ct.* at 3205, 82 *L.Ed.*2d at 409.

Appendix B

On their cross-appeal, plaintiffs contend that the trial court erred in remanding their rent increase application to the Board instead of determining the rent increase issue in the Law Division. This contention is without merit. *R.* 2:11-3(e)(1)(E). Plaintiffs also contend that they are entitled to punitive damages for the § 1983 violation, a greater award of counsel fees, interest and other costs, and counsel fees generated by proceedings in the Appellate Division, including this appeal. In light of our determination that defendant did not violate § 1983, we need not address those issues.

The judgment against defendant for counsel fees and compensatory damages is reversed. The judgment remanding plaintiffs' application to the Board is affirmed.

APPENDIX C — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, THE LAW DIVISION, OCEAN COUNTY FILED APRIL 14, 1993

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Attorney for Plaintiffs

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — OCEAN COUNTY

DOCKET #: OCN-L-6650-90

CIVIL ACTION

DAVID RIVKIN, EDWARD RIVKIN and JUDITH RIVKIN, t/a GALAXY MANOR, A New Jersey Partnership,

Plaintiffs

vs.

DOVER TOWNSHIP RENT LEVELING BOARD,

Defendants

FINAL ORDER OF JUDGMENT FOR ATTORNEYS FEES AND COSTS OF SUIT

THIS MATTER having come before the Court sitting without a jury on February 16, 1993, and also on April 5, 1993, and the Court having heard the evidence and the argument of the attorney for their respective parties, the Court finds:

Appendix C

1) That the Dover Township Rent Leveling Board (hereinafter "The Board") violated plaintiffs' due process rights during the course of hearings on a rental increase application which commenced on or about June 19, 1990;

2) That the said violations of due process are prohibited by 42 U.S.C. 1988;

3) That as a result of the violations of 42 U.S.C. 1983, plaintiffs are entitled to an award of counsel fees and costs of suit under Title 42 U.S.C. 1988;

THEREFORE, it being the opinion of the Court that judgement should be entered in favor of the plaintiffs, for the relief demanded in the complaint with respect to counsel fees and cots:

IT IS, therefore on this 14th day of April, 1993

ORDERED, that judgment for counsel fees and costs be entered in favor of the plaintiff and against the defendant in the sum of $39,679.55 together with costs to be taxed, and it is further

ORDERED, that defendant shall pay to plaintiff $6,303.34 as and for compensatory damages.

IT IS further hereby certified that pursuant to Rule 4:42-2, this Order is final and enforceable under Rule 4:59, and for purposes of appeal.

s/ Rosalie B. Cooper, J.S.C.
Hon. Rosalie B. Cooper, J.S.C.

APPENDIX D — TRANSCRIPT OF HEARING DATED FEBRUARY 16, 1993

OCEAN SUPERIOR COURT
CIVIL PART
OCEAN COUNTY, NEW JERSEY
DOCKET NO.: L-6655-90

Place:
Ocean Superior Court
Civil Part Ocean County, New Jersey

Date:
February 16, 1993

TRANSCRIPT OF PROCEEDINGS

GALAXY MANOR

vs.

DOVER TOWNSHIP RENT LEVELING BOARD

Defendant

BEFORE:

HONORABLE ROSALIE B. COOPER, J.S.C.

TRANSCRIPT ORDERED BY:

COURTLAND T. BABCOCK
2610 Yorktown Blvd.
Brick Township, NJ 08723

Appendix D

APPEARANCES:

REUEL TOPAS, Attorney for the Plaintiff

COURTLAND BABCOCK, Attorney for the Defendant

Transcriber Phyllis Binder
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[2] INDEX

	DIRECT	CROSS	REDIRECT	RECROSS
WITNESS FOR THE PLAINTIFF				
WITNESS FOR THE DEFENDANT				

THE COURT: Decision

[3] THE COURT: I think your counsel fees are a problem, think of the last case. All right.

MR. TOPAS: Is that your secret weapon Judge?

THE COURT: Definitely this is my secret weapon because she has to explain to me why I have these numbers and maybe you can. Your appearances.

* * *

MR. BABCOCK: You've effectively listed from Mr. Topas' letter of January 8 certain items that are to be [29] deducted from the total fifty eight thousand dollars, and that's this thirty nine thousand dollar figure. Now as I understand Your Honor's ruling, is it at this juncture that that is the amount of money that Mr. Rivkin is entitled to be reimbursed?

THE COURT: Yes.

MR. BABCOCK: All right now if I understand that correctly then I have the following comments. First with respect to that which I assume Mr. Topas wants to speak to and I'll certainly speak to it at length, let me just add the following for the record. I do not agree that the giving of counsel fees in this circumstance is appropriate, I think the record should probably reflect for today's purposes that Your Honor has conducted two prior telephone conference calls with counsel about the substance of your rulings today and as I understand those from December 7 and December 23, 1992, certain of The Court's indications given in those telephone conferences which are on the record are a portion of or the foundation for the factual findings that youve made today. And thus I understand where you have gotten to or where The Court has gotten to in terms of the figure that has been recounted. Now having said that I still disagree as a matter of law for a number of reasons, not only because of the non-existence of the respondeat superior theory and in the face of Gregg and Alsar Technology, cases in State Court which in effect say to you as [30] a trial Judge you must grant counsel fees. I accept that as a given, that's the law. What's wrong in this case is that the correct party is not a defendant in the case. Because what is the mistake is presuming that an issue of indemnification, that the township may or may not determine to pay is the equivalent of naming the correct party defendant in the case and pursuing and proving a claim against that party. What I mean by that is not only what the

law indicates as I understand it, but that Your Honor's ruling in November of 1991 did not find any malfeasance, improper conduct, unconstitutional conduct as I understand it by the Dover Township Rent Leveling Board. It found it as to an individual and that individual infected the ultimate decision. Now maybe I'm pursuing an issue that Your Honor feels is already crystal clear in terms of the order entered. If that is the case, I don't know if The Court feels any need to clarify that at this juncture, but I certainly still don't understand that this court found the Rent Leveling Board to have committed unconstitutional acts.

THE COURT: Well I found that because of the actions of Mr. B. in this case that his actions permeated the board, that the board allowed his actions and comments to affect their judgment in the case and therefore the board was recalcitrant with respect to this matter as Mr. B. being the if you will the yeast in the decision making. But they allowed and accepted his comments and incorporated it into their findings, and as I [31] remember it he came off with a number that was no where, that actually had no factual basis, and that was, but what I am saying to you is that I think that in allowing him to continue descent, and I think that Mr. Levin many times pointed out the prejudicial attitude of this gentleman, I think that it permeated the whole decision of the board, not just his act, but the whole decision of the board and in allowing it to happen, and I think he should have been asked by the chairman to step down and I think that, and I thought that I crystally clear found that the board was in violation of his rights, but the active ingredient to make the board recalcitrant with respect to his civil rights was this Mr. B. So I can make it clearer then that.

MR. BABCOCK: I understand that perfectly Your Honor and to the extent that that is or isn't a clarification, I appreciate

* * *

Appendix D

THE COURT: No I want to hear from you as soon as I can hear from you, but after I hear from you then he will have ten days to supplement what he wants, you will have ten days [50] thereafter to do whatever you want to do, and we'll set it down or an argument, but I have to get a date certain on this so that we end this, and you can go forward to that, whatever you want to do in the future.

MR. BABCOCK: All right and I do need to apply for the stay Your Honor because undoubtedly the Township Committee is going to direct me to appeal it.

THE COURT: Well I have no problem with that —

MR. BABCOCK: No I know you don't Judge —

THE COURT: Just do it.

****

STATE OF NEW JERSEY)
) SS
COUNTY OF MONMOUTH)

I, PHYLLIS BINDER, assigned transcriber, do affirm that the foregoing is a true and accurate transcript of the proceedings in the matter of Galaxy Manor versus Dover Township Rent Leveling Board on February 16, 1993, in the Ocean County Superior Court, Civil Part, and recorded on Tape #RBC-68-93, Index #0520-6460, of that court.

Appendix D

Date: June 24, 1993

s/ Phyllis Binder
Phyllis Binder
BESTWAY TYPING UNLIMITED

APPENDIX E — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, OCEAN COUNTY FILED NOVEMBER 15, 1991

BABCOCK, HENNES & BIELORY, P.C.
2610 Yorktowne Boulevard
Bricktown, New Jersey 08723
(908) 255-6500
Attorneys for Dover Township
Rent Leveling Board

SUPERIOR COURT OF NEW JERSEY LAW DIVISION:
OCEAN COUNTY

Docket No. OCN-L-6650-90

Civil Action

DAVID RIVKIN, EDWARD RIVKIN and JUDITH RIVKIN, t/a GALAXY MANOR, a New Jersey Partnership

Plaintiffs

vs.

DOVER TOWNSHIP RENT LEVELING BOARD

Defendants.

ORDER

THIS MATTER, having been presented to the Court upon a status conference conducted on October 25, 1991, and upon a regularly scheduled trial date on November 1, 1991, and the

Appendix E

Court having had the benefit of the briefs filed, arguments of counsel and for good cause shown,

IT IS, on this 15th day of Nov. 1991

ORDERED that the original determination of the Dover Township Rent Leveling Board, dated November 20, 1990, is hereby vacated due to the record before the Board evidencing bias and prejudice of a single Board member, Mr. Baltarzuk, which finding mandates a remand to the Board of all of the issues presented on the original application for the conduct of complete and full hearings and findings of fact and conclusions of law to be generated by the Board in the normal course; and it is further

ORDERED that in such remand hearings, Mr. Baltarzuk may not participate as a member of the Dover Township Rent Leveling Board; and it is further

ORDERED that an application for counsel fees has been made by Plaintiff, David Rivkin, which application the Court reserves its decision on based on and to follow the remand hearings required by this Order, and such additional briefs from counsel for the Dover Township Rent Leveling Board and plaintiff as they may wish to file; and it is further

ORDERED AND ADJUDGED that the Complaint and allegations set forth do not raise a question facially as to the constitutionality of the ordinance in issue; and it is further

ORDERED that a copy of the within Order shall be served upon counsel for the defendants within 10 days hereof.

s/ Rosalie B. Cooper, J.S.C.
ROSALIE B. COOPER, J.S.C.

APPENDIX F — TRANSCRIPT OF HEARING AND DECISION DATED NOVEMBER 1, 1991

OCEAN SUPERIOR COURT
CIVIL PART
OCEAN COUNTY, NEW JERSEY
DOCKET NO.: L-6655-90

GALAXY MANOR

vs.

DOVER TOWNSHIP RENT LEVELING BOARD

Defendant

Place:
Ocean Superior Court
Civil Part Ocean County, New Jersey

Date:
November 1, 1991

TRANSCRIPT OF PROCEEDINGS

BEFORE:

HONORABLE ROSALIE B. COOPER, J.S.C.

TRANSCRIPT ORDERED BY:

COURTLAND T. BABCOCK
2610 Yorktown Blvd.
Brick Township, NJ 08723

Appendix F

APPEARANCES:

REUEL TOPAS, Attorney for the Plaintiff

COURTLAND BABCOCK, Attorney for the Defendant

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[2] INDEX

DIRECT CROSS REDIRECT RECROSS

WITNESS FOR
THE PLAINTIFF

WITNESS FOR
THE DEFENDANT

THE COURT: Decision

[3] THE COURT: Your appearances please.

MR. BABCOCK: Courtland T. Babcock II of Babcock, Kennis and Bilori for the defendant Dover Township Rent Leveling Board.

MR. TOPAS: Reuel Topas of the law firm of Levin, Shea,

Pheiffer and McMann on behalf of the plaintiff Galaxy Manor Mobile Home Park, David Rivkin, Edward Rivkin and Judith Rivkin.

THE COURT: I just want to put on the record the fact that we had a conference concerning this matter, I think it was last week, last Friday right. The only reason that we are here today is at the insistence of Mr. Topas. I have gotten numerous telephone calls asking for adjournments in this matter. I think it is extremely unfair to try and arrange this court's schedule to suit the people who are part of this case for whatever reason they put forth and I wanted to make it perfectly plain that the only reason we are here is with regard to Mr. Topas's request, and I certainly will allow him to put on the record, but I deeply resent the telephone calls that asked for whatever reasons that this court adjourn this matter when I have put it on specially for a hearing, which Mr. Babcock felt was totally unnecessary and Mr. Topas did not. I would also note for the record a case that was not part of the thirty or forty page brief that was sent to this court and that is Gregg versus Township Committee and I would really like you [4] to address that issue first because that would appear to this court to say that with respect to counsel fees and civil rights that plaintiff or Mr. Rivkin was entitled to counsel fees with respect, and costs, with respect to the prior hearing. The Court having found and will find again there was bias and prejudice on the part of Mr. B. whose name I can never remember, but I'm sure that you will assist me in that.

MR. BABCOCK: Baltarzuk.

THE COURT: Baltarzuk. And having found that there would have been an automatic denial of due process under the circumstances. There is no question facially as to the

constitutionality of the ordinance and this court would certainly not intervene with its opinion as to anything other than that which I stated since I thought it was so prejudicial that I thought that the case had to be remanded, having another person sit. But I think that the question of counsel fees as raised in this Appellate Division case as I note again was not presented to this court previously does raise a good faith question concerning The Court's discretion with respect to the award of counsel fees in a circumstance which is totally different, but nevertheless comes out to a denial of due process because of undue prejudice. I would ask you to address that Mr. Babcock since the case is pretty clear in its language concerning that.

MR. BABCOCK: Well if Your Honor please I would have [5] to preliminarily indicate on the record that my first addressing of Gregg would be to move to suppress it because Your Honor in effect and I don't mean it in the context of The Court permitting it, but Your Honor gave the benefit of both Mr. Topas and myself The Court's thinking and analysis as to all of the facts of this case last Friday. I received a copy of this case, which I am familiar with having dealt with the issue both for this township and others by fax that was on my desk this morning when I returned to my office after having been in trial in Essex County since last Friday when I was last before Your Honor. So my first comment is that to provide Mr. Rivkin in this action a minimum of two bites at the apple is an inappropriate thing to do. I'm familiar for example with this court's ruling on this case and the comment made by Your Honor last Friday, in effect if I may paraphrase, what in God's name is there left to brief in this matter, because as you've already indicated the issues were shall I say copiously addressed.

THE COURT: Although I have to put an addendum to that

* * *

Your Honor to accept the interpretation of my expert. [17] I'm saying that this is a legal question, that The Court does not owe any deference to the board's determination of a question of law and that The Court can look in with or without regard to what our respective experts have said and say what does the ordinance mean and what does the IRS Code, say the ordinance means and make a determination which expert was right or both were wrong.

THE COURT: No I can't make that determination any more than I can make a determination in this case while I'm hearing a jury case and two experts are offered, whether expert for the plaintiff is correct or expert for the defendant is correct. I can not and I should not. That's no my province. We have a rent control board sitting in effect as a jury. They are making findings. You present an expert who says X, there is an expert on the board who says Y. They can accept whatever expert they believe. Obviously they accepted the board's expert, but very differently than the Helmsley case because they did not except his numbers across the board, they made individual fact findings as to each individual item. I think that, however, and I do say this adviseraly, that the board should be advised that if they unrefuted testimony, unrefuted credible testimony, that they can not just off the wall make a decision that it's wrong or right. They have to have something more than that, and I think that there are a couple of cases, there are a couple of matters and that's why I mentioned the [18] fire hydrant part of that case where they decided that the truck had run over the fire hydrant, but then there was unrefuted testimony that repairs had been made, and they just took out the whole fire hydrant on the basis that the truck ran over the fire hydrant. And I think that if they had been advised at that point in time that they can not make an assumption without having some proof to the contrary, that the would be a more valid, that is a valid

decision on their part. You understand what I'm saying.

MR. BABCOCK: Yes and I've written it down.

THE COURT: Okay. Go ahead.

MR. TOPAS: If I might continue Your Honor.

THE COURT: Yes.

MR. TOPAS: Going further to the argument as far as the fact that the board's decision making below involved an interpretation of the statute —

THE COURT: Ordinance.

MR. TOPAS: Of the ordinance, I beg your pardon. In any case there are no other considerations as Your Honor as pointed out the ordinance is relatively bare of any self-contained interpretive language. It says refer to C, the IRS Code. So it certainly doesn't have within it any of the considerations such as direct benefit to the tenants that the board —

THE COURT: It does not, your right it does not state [19] that —

MR. TOPAS: Did incorporate into its fact finding. In fact you can look right into the resolution of the board and I believe at least to one item which was the paving and the office area, they specifically stated that they found that there was no benefit to the tenants and that therefore they were denying the item and there's no basis —

Appendix F

THE COURT: What do you think the basis for rent control is? The very basis. You're taking little pieces of this ordinance, the basis for rent control is that the owner should get a fair return on his dollar. That's what the basis of rent control is, and if there are capital expenditures that are made that in some way enhance the value of the property, that he should be recompensed for that. If he bought a helicopter to deliver his from Rumson to the office, that would be a capital expenditure because it certainly would last more than a year and he would pay for it over more than a year. Inherent in a rent control statute this court is finding is the fact that if you are going to have a capital improvement and address it as such that's what your whole argument was, not your argument. Mr. Levin's argument was the driveway benefitted the tenants because it enhanced the look of the whole place and in addition, and they threw it on the side, it also stopped the stones from going down the drain. Okay. That was one thing. That they got a benefit from the computer and [20] from the photocopier that was in the sales office, although they were not permitted to go into the sales office, because it made the work cheaper on the part of the landlord. That they, I'm not talking about the mandatory things, the mandatory things I think they gave him. Mr. Rivkin testified that he allotted fifty percent to the Bobcat, fifty percent to the Tractor, fifty percent to the Back Hoe, fifty percent to the sweeper, this is all from memory as I remember the transcript. And he did that, he was unrefuted, that's one of the things that I was talking about, he was unrefuted in that, and he had been qualified as an expert, and I, that's where that prejudice and bias came in. I think that the gentleman Balterzak, I think that he exercised so much of a negative influence over these people that they lost sight of what that which they should have been looking at. And that's why I told Mr. Babcock that he has to tell these people that they can't lose sight of that. If you've got unrefuted testimony, you've got unrefuted testimony. And it was

unrefuted at that point. And I think that it just, it's just what it was. And I think that when they decide it's going to be over, though I don't understand how and I will tell you and I will put this frankly on the record, how they decide the depreciation time. I have no idea. Nobody really explained that. Somebody said fifteen years, somebody said seven years, I don't know how they do that. I mean, and there was certainly no testimony in those transcripts [21] because I read four transcripts over a long period of time. I have no idea of how that even came about from anybody. So I can't make any, certainly any judgment on depreciation factors, because there was nothing to even consider in that regard. But go ahead.

MR. TOPAS: Your Honor I believe you raised a question about, I was arguing about the point about benefit to the tenants not having been a valid consideration within the ordinance. I understand Your Honor is raising the question that in the general context of rental control there has to be some rational relationship of an item that we're claiming is a capital improvement to the operation of the park, that in some way its to the benefit of tenants. Now it's been our position all along that without a finding of direct benefit to the tenants that when you buy a piece of equipment and you use it in the operation of the park, and that equipment falls within the definition of capital improvement as set forth in the ordinance and defined in the code —

THE COURT: Capital expenditure.

MR. TOPAS: Well it's capital improvement in the ordinance Your Honor, capital expenditure in the code.

THE COURT: Yes sorry.

MR. TOPAS: That in that case that you have a clear cut case, it's not a helicopter coming in from Rumson, the Rivkin shuttle if you will, it is an item that is used within [22] the park and in normally daily operations. Like when you have a factory and you have an office upstairs and they have typewriters and copiers and computers, and likewise they buy street sweeping equipment because they have a large parking lot they have to maintain and keep clean and so forth. And that's seems as clear as day to have been well within the contemplation of the ordinance, and in fact well within what Your Honor is saying. If this is within the park —

THE COURT: Well if that's correct.

MR. TOPAS: This is a piece of equipment that is used in the operation of the park, then it is in fact a capital improvement.

THE COURT: Well no, not necessarily. If they are redoing the driveway because the township, because they keep the papers in a dumpster and the township requires them to redo the driveway and what they've got is insufficient and they won't allow anybody, they won't even allow the tenants according to unrefuted testimony of the tenants to go to that office to pay rent, they will not allow those tenants to use that dumpster for any purpose, where is that a benefit, there's a sales office in there, we all know that, and what I'm saying to you is that inherent in a rent control statute and a capital improvement return, it has to be of some benefit to the park. The case that you cite that came after this case, which I think is irrelevant since the facts are totally different, that was [23] all improvements to the clubhouse, that all of the tenants shared. It was blinds, I forget what else, umbrellas, whatever it was, it was in the clubhouse. I wouldn't have any problem in that situation in deciding that those are all

capital improvements for the benefit of the tenants. But that is a totally different fact scenario. These people are claiming that part of this equipment, they're saying all of the equipment, but at least part of this equipment was used not only for the upkeep of this mobile home park, but it was used to build new trailers, it was used in another trailer park that Mr. Rivkin owned, and god bless him that's fine. But they're saying that they should not be hit with the total cost of this and when they knocked the whole thing out I think they were being unduly influenced by Mr. Balsak, wrong name, but we all know who I mean.

MR. TOPAS: Your Honor touched upon the Homestead Run application which was heard later that night, so I just wanted to —

THE COURT: Which is really irrelevant.

MR. TOPAS: I just wanted to comment that its not the case that in that application all of the items were installed in the clubhouse for the direct benefit of the tenants —

THE COURT: Most of them were.

MR. TOPAS: In fact a truck and some plowing equipment which were very similar to some of the maintenance equipment [24] that we were seeking a rental increase for were granted to Homestead Run and denied to Galaxy Manor.

THE COURT: Yes, but you have a different situation. They weren't building and putting up new trailer park homes with them. Your Mr. Rivkin admitted this.

MR. TOPAS: Right and he only sought an increase for the proportion that it was used —

Appendix F

THE COURT: That's why I think you have to have a remand. This Court can not sit here and make those decisions. That's exactly what I'm telling you. I am telling you that this man was prejudice, his prejudice showed, the killing stone as far as this court was concerned, was when he advised one of the tenants to file an action, while this action was pending, against the landlord. That was absolutely the straw that broke the camels back as far as this court is concerned. And I think that if you look at all of the language and all of the discussions that he exercised an undue influence over the other board members. That's just as plain as I can say it. But I think that there has to be inherently in a rent control statute, when somebody is looking for a return on a capital investment, there has to be some benefit, and I'm not deciding at this point that they were wrong or right or arbitrary or capricious, I don't have to do that because I'm deciding at this point that it was, what they did was illegal because of the prejudice of this one man which was obviously on the [25] record. And I'm reserving on the counsel fees and I don't what else we have left in this case.

MR. TOPAS: I think that the only thing we do have left is specifically rulings as far as whether there were constitutional violations, and I think Your Honor has already indicated that in a case of bias, in open bias by a board member, which has unduly influenced the other members of the board in their decision making capacity, there is —

THE COURT: Certainly a constitutional issue —

MR. TOPAS: A constitutional issue there and I don't understand —

THE COURT: And I'm going to, but I'm going to allow

* * *

Appendix F

[30] STATE OF NEW JERSEY)

)SS

COUNTY OF MONMOUTH)

I, PHYLLIS BINDER, assigned transcriber, do affirm that the foregoing is a true and accurate transcript of the proceedings in the matter of Galaxy Manor versus Dover Township Rent Leveling Board on November 1, 1991, in the Ocean County Superior Court, Civil Part, and recorded on Tape #RBC-165-91, Index #1618-4799, of that court.

Date: June 24, 1993

s/ Phyllis Binder
Phyllis Binder
BESTWAY TYPING UNLIMITED

APPENDIX G — TRANSCRIPT OF HEARING AND FINDINGS BY THE HONORABLE ROSALIE B. COOPER, J.S.C., DATED OCTOBER 25, 1991

OCEAN SUPERIOR COURT
CIVIL PART
OCEAN COUNTY, NEW JERSEY
DOCKET NO.: L-6655-90

GALAXY MANOR

vs.

DOVER TOWNSHIP RENT LEVELING BOARD

Defendant

TRANSCRIPT OF PROCEEDINGS

Place: Ocean Superior Court
Civil Part
Ocean County, New Jersey

Date:
October 25, 1991

BEFORE:

HONORABLE ROSALIE B. COOPER, J.S.C.

TRANSCRIPT ORDERED BY:

COURTLAND T. BABCOCK
2610 Yorktown Blvd.
Brick Township, NJ 08723

Appendix G

APPEARANCES:

REUEL TOPAS, Attorney for the Plaintiff

COURTLAND BABCOCK, Attorney for the Defendant

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[2] INDEX

DIRECT CROSS REDIRECT RECROSS

WITNESS FOR
THE PLAINTIFF

WITNESS FOR
THE DEFENDANT

EXHIBITS: Ident. Evid.

THE COURT: Decision

[3] NOTE: Judge Cooper via speaker phone from Jefferson Hospital.

THE COURT: Okay just put your names on the record and for whom you are appearing please.

Appendix G

MR. TOPAS: Reuel Topas on behalf of Levin, Shea, Phieffer and McMann, appearing on behalf of the plaintiff of the plaintiff Galaxy Manor Mobile Home Park.

MR. BABCOCK: Courtland T. Babcock of (indiscernible) Babcock, Kennis and Bilori for the Dover Rent Leveling Board.

THE COURT: All right I have read all of your briefs, I have read all the cases that went with all of your briefs, and I've been thinking a lot about this case and I found out through, you know, just in general that there are alternates are there not to this rent control board? They're not just the, Mr. Rivkin was one of them I assume because he was stepping down, but then there were how many people left? Was McKenna the Chairlady, Mr. B., I never remember his last name —

MR. TOPAS: Baltarzuk Judge.

THE COURT: Yes and then who is the last one?

MR. TOPAS: Sophie Chalmer Your Honor?

THE COURT: No that was the Chairlady.

MR. TOPAS: Right.

THE COURT: You also had, you should know these names better than I should.

MR. TOPAS: No not me Judge, I didn't handle the hearings. That's Peter Hennis who was at the hearings so —

Appendix G

[4] THE COURT: There was somebody who was representing, I think Pastel.

MR. TOPAS: That's right Your Honor.

THE COURT: All right now I have read very carefully all of the references in the transcript and I had the transcript at home and I asked my clerk to underline all of the references of this Mr. B, as I call him. And I am finding that Mr. B. has exhibited a great deal of bias and prejudice in this case, and I don't see how, he is permitted under the cases to testify as to things that he knows about in the area such as the price of this, I think he spoke about the price of certain well trappings and so on and so forth, which Mr. Rivkin paid less for then he indicated as I remember the transcript. The thing that bothered me the most about him was that during the course of these hearings he encouraged a tenant to appeal a rent level for which he was successful, but when you go from, I understand that Dover Township takes one person who proportedly is a landlord and one person who is proportedly a tenant and then fills in the other three with public members —

MR. TOPAS: Correct.

THE COURT: And I think the point was made that that, and I think well taken, that that in itself creates an inherent conflict, but what somebody puts on the record when they're supposed sitting as a Board member that I'm here for the tenants that's improper. They can be a tenant's advocate, but [5] not when he's sitting as a Board member. When you're sitting as a Board Member, you're sitting as a Judge and you have to, even though your a tenant's representative and want to do the best for them, that's not your capacity in sitting on a board like that. And my thinking on the whole matter is, and I have notes on the whole

case that already precausily typed up, but must tell you that my initial reaction is that this should be reversed and remanded and omitting Mr. B. as a sitting board member because I think he's improperly there and I think he's exhibited enough bias and Paul if you will read into the record the statements that he made which I asked you to underline in yellow, I'd like to see that on the record as examples for my thinking in this matter.

MR. JOHNSON: Okay Your Honor.

THE COURT: Would you do that please.

MR. JOHNSON: Yes. Okay Mr. Baltarzuk said that his function at the time of the hearing was that he was here to serve the people of the mobile home parks. Mr. Blatarzuk took the position that he wanted the case thrown out because of a mistake in a rent level for one tenant, even though counsel for the Board told him it was not grounds to throw out the application. He later threatened the applicant by stating, you are looking for trouble and you are going to get it. Mr. Baltarzuk advised the tenant witness to file a complaint against the applicant with HUD for an alleged violation of [6] equal housing opportunity.

THE COURT: Okay that is going beyond the boundaries as far as I'm concerned. I can understand some of the other language with respect to the Chairlady. I think that what she did was fair comment, coming to opinions and so on and so forth. But when he comes up saying things like that, I think that his prejudice and bias is obvious, and I think that looking at colloquies between all of the members where they would finally come to an agreement on certain matters, I think that he was greatly influential in their coming to agreements on certain matters. Now I'm not saying that another board would not have

come up with the same decision making, so I am not saying what they did was improper. I am saying that to allow somebody like that to sit on a board with statements such as those that were quoted is improper, and as officers and alternates in this situation I think that the alternate should sit on the board. And I don't know if that alternate and perhaps you can advise me Mr. Babcock whether that alternate would be a tenant's representative, do you know?

MR. BABCOCK: No ma'am I do not.

THE COURT: Okay.

MR. BABCOCK: But I can certainly ascertain that and let you know better mechanically anything occurs.

THE COURT: Well regardless of whether or not, this man as far as I'm concerned has exhibited so much prejudice and [7] bias in this case that it would be improper for him to sit as a hearing officer.

MR. BABCOCK: May I ask you some questions there Judge?

THE COURT: Yes.

MR. BABCOCK: Clearly I hear that you're saying that with respect to the remand that you're indicating you feel so far, on the record so far is the proper thing to do —

THE COURT: Right.

Appendix G

MR. BABCOCK: What I'm unclear on and I apologize because I'm in trial in Essex and have been for two weeks, I have not been through these pleadings in detail before today. I didn't expect this to be in effect a decision or The Court's advice about where we were.

THE COURT: Well this really is an advisory situation more then anything else.

MR. BABCOCK: I understand that Your Honor. What I'm curious as to is whether what you're indicating to me is that the handwriting on the wall that we should be talking to the Township Committee about him being removed or whether you're indicating to me that that relief isn't in this action and you're not getting to that point, you're simply suggesting to me how this is got to be handled on the remand and then let me worry about the political problem with my client.

THE COURT: Right. What I am saying to you is with [8] the statements that he made in this particular case, I'm not looking at other cases because I don't have to look at other cases, but with statements such as Paul just read into the record for this particular case Mr. B. is showing prejudice, partiality and bias, and in his discussions with the rest of the board members he is exerting a great deal of influence. And I'm not saying he should be thrown off the board, as a matter of fact Mr. Levin a couple of times suggested that he, excuse me, not sit as a board member for this particular case as I remember because I read the transcript a couple of times. But what I'm saying is that that was an error and that although I know the plaintiff is going to say don't remand, make a decision I can't do that because the decision as to what is a capital improvement I cannot accept blindly the statement of Mr. Moll. That's going to be up to whether the board members

accept that statement and in fact it is a very different case then I think the Helmsley case wherein the board depended totally upon the figures that were presented by the accountant.

MR. TOPAS: Your Honor —

THE COURT: In this case, just a second, in this case both gave definitions of what was a capital improvement vis a vis capital expenditure, and there's a world difference between that and what happened in the Helmsley case. And if the Board chooses to accept the definition of its accountant as opposed to the definition of plaintiff's accountant, well that's the [9] way it works in a courtroom.

MR. TOPAS: Your Honor.

THE COURT: Yes.

MR. TOPAS: If I might address just a couple of things that you're talking about dovetailing into the question of, your inclination to go with a remand at this point. First just to back track I would just point out that, why Your Honor is correct that the Board can choose to accept the definition of the accountant. Our whole point in this case is that the accountant was dead wrong, he's is dead, solid wrong —

THE COURT: I know you say that.

MR. TOPAS: We're asking The Court to find that he was absolutely incorrect about —

THE COURT: I can not do that because I don't agree that capital improvements and capital expenditures is the same thing.

MR. TOPAS: I'm sorry Your Honor said you don't agree?

THE COURT: I do not agree with Mr. Moll's definition. The whole point of the rent control act was to allow this man to get a fair return on his dollar spent. And just because he decides to have an expenditure for a period of more than a year, that doesn't automatically make it a capital improvement. It still has to be a capital improvement. That's why you went, as a matter of fact if you looked at Mr. Levin's language, even though it starts off with that definition, in the long run he [10] comes down to and I remember it specifically in the transcripts, that it has to show some not new to the whole park and that's why they went through this whole diatribe with respect to the blacktopping —

MR. TOPAS: I'm sorry I didn't hear the last word.

THE COURT: The blacktopping, the reason for the blacktopping, and then it was thrown in, well that it's also good because it doesn't clog the storm drain. But implicitly there's an admission that, you just can't make a decision that you're going to take yourself over a year and they say well it then becomes a capital improvement.

MR. TOPAS: Well Your Honor I think the definition that we look to is not that the payments extended over a year, but that the useful life of the item is more than one year and that's what the IRS code calls for and that's what the rent leveling ordinance talks about. The only thing it give you is reference to the IRS code.

THE COURT: I know that but you can not take that and just present that. You can't put it, it's not (indiscernible) it doesn't stand by itself. By itself it says other things, and your man is

saying well I gave a fifty percent credit on this spot tax. Well where did he come up with that figure?

MR. TOPAS: Based on a good faith estimate of how much he had used it in one location as to the other.

THE COURT: Well that's not real proof.

MR. TOPAS: It's testimony before the Board Your Honor. It's uncontradicted.

THE COURT: I know, but that's not really proof is what I'm trying to tell you.

MR. TOPAS: I don't think Your Honor intended for us to go to the merits and discuss —

THE COURT: No I am really going to the remand, I have to tell you that. I'm going to, my inclination and if you want me to put it on the record I will be happy to do that, is that I think that this should be remanded because of the bias of one of the board members and, which was plainly shown that this Mr. B., I don't know what his full name is, as exemplified by —

MR. TOPAS: The comments your clerk has placed on the record Your Honor.

THE COURT: Yes, well he, well yes he has put some in, but there is much more than that in the record.

MR. TOPAS: We agree.

Appendix G

THE COURT: And I think that his prejudice is obvious and I don't think that you can have such obvious prejudice and have a decider effect at the same time.

MR. TOPAS: Your Honor if I might I just wanted to complete my comments about —

THE COURT: Go ahead.

MR. TOPAS: For the record about your decision of your inclination to remand this matter, and that is that obviously [12] as Your Honor anticipated our client would vigorously oppose that kind of a decision on your part. For the simple reason that we've had, the kind of experience we've had with this board. And there's no reason to believe that just because we eliminate Mr. Baltarzuk that we won't end up in the same situation. That's why we got here in the first place.

THE COURT: Well Mr. Baltarzuk is the man that I am finding exhibited the prejudice. The other people when they were discussing things, were discussing things, and that's what they're supposed to do as board members, and I am finding that they are not exhibiting the prejudice that you're talking about. Now when it comes to Mr. Baltarzuk, and it would have been the easiest thing in the world for me to say no he was not prejudice and he could ask these questions, but I really thought about it and I really feel that he overstepped the bounds in this particular case and that's why I asked whether they didn't have an alternate member. In other words I'm finding that when your Board Chairman did not have him step down, that she made a mistake.

MR. TOPAS: I understand.

Appendix G

THE COURT: And that's the reason. I don't have to decide anything else at this point.

MR. TOPAS: Well Your Honor may I address that particular point. It seems that if you're finding bias, that falls squarely within the violations of due process that we [13] outline in our brief and I don't see how Your Honor can not make a determination on that constitutional issue as well as our attorney's fees.

THE COURT: Well I tell you right now I think you are way off base in forty three, I think that was intended for cases such as police officers, where they kick people in heads. It was not intended, can you imagine viably that every time somebody got an incorrect decision on a Board of Adjustment or a Planning Board that they could come in and cry under the civil rights act that they're entitled to counsel fees?

MR. TOPAS: Your Honor I'm not asking The Court to do that, what I'm suggesting to The Court is that this is not that sort of a case. We just didn't get an incorrect decision, we got a decision which Your Honor has just determined was found to be based on the biased, open biased acts of a board member. That's more than just being incorrect, that's unfair, it's prejudicial, it's —

THE COURT: But I am saying that it does not apply in the situation. You show me one case in which they, except in the most extraordinary of circumstances, do you realize what you are opening the door to when you're asking for this? You go to the Planning Board, the Planning Board gives you an incorrect, not incorrect, but a decision that turns out to be, it's overruled on the trial level, on the constitutional level, on these you're entitled to

counsel fees for that, never. It [14] was never intended like that. That's not what it was intended for.

MR. TOPAS: Your Honor I don't think that there's any basis to find that just because there's no precedent for an award of counsel fees when you're on an appeal of a decision of a municipal body that that by itself precludes the award of those fees. And I think that the issue really is here, is not simply that they were incorrect, they treated our client differently form another applicant who they decided differently on the same issues a half hour later.

THE COURT: That's a bunch of hog wash because that came afterward. Anything that came afterwards The Court can't consider, you know that. What I am saying to you is that I don't think that the civil rights act, first of all he was treated as a landlord, so if you had gone through all of the cases as to the differential treatment, you would see that if he was treated as a landlord and he was certainly treated as a landlord in this case, the big question that comes up was should he have gotten credit for this, for these what he says were capital improvements, which your accountant says were capital expenditures and equating them. And I think that you have to look at the larger part of the rent control act, and although the definition is not there, the definition goes to capital expenditures, not to capital improvements, and they are saying for the purposes of the IRS, yes use capital [15] improvements, use capital expenditures, but they don't say anything about capitol improvements and you know that. It's not in there. I read that statute three times.

MR. TOPAS: What else could they be referring to Your Honor?

Appendix G

THE COURT: I don't know, but it's not referring to capital improvements, and you have to look at this in the whole context. You just can't draw out pieces. And what I'm saying to you is that on the basis of what I see now, and I will keep your briefs, I will keep all of my notes, but on the basis of what I see here, I think that there was bias and prejudice on the part of one of the members, I think that it was a mistake made by the Chairlady in not removing him, but you have to remember also that she is a lay person and doesn't understand all the nuances in the law, that's why you're on appeal to begin with. I don't think that they have to accept your experts statements that, as to the fact that these were capital improvements, even though you might think it was a perfectly fine statement, and it might be a perfectly fine statement. I don't think they're bound by any experts, they're bound by their own. That's what the cases say. But now I don't think this man got a fair shake because of this one member and as I say Paul, if you want to read more of his statements into the record, then let's do it so that Mr. Babcock has something to take back to the Township Committee.

[16] MR. BABCOCK: Your Honor you don't need to do that for me for the purposes of the Township committee. I'll just indicate for the record that I'm not surprised by the finding you made.

THE COURT: Well I'm sure that Mr. Topas is not either on that aspect, but when you try and jump from there to civil rights and so on and so forth, that's no in my estimation, first of all it's a discretionary call on counsel fees. That's number one, and number two is that I don't think its proper for in this kind of a context for the reasons that I've already put on the record that they should be awarded counsel fees in a situation such as this.

MR. TOPAS: Your Honor I don't want to belabor the point, but if you could clarify for me how you can distinguish between a finding that a board member was biased when acting on behalf of a municipal body and a finding that there's no constitutional violation. It's the very definition of a constitutional violation. To find that there was bias means by itself, its self-defining as a constitutional violation.

THE COURT: The cases, if you read all of the cases, and there's a book right in my chambers, you won't find any case that deals with a board such as this, and getting counsel fees. Not one. They were meant for people who were being beaten up by police officers and so on and so forth and didn't have money to pursue an action. Now you're not going to tell [17] me that your client did not have enough money to pursue the action.

MR. TOPAS: Your Honor that's not the issue, the issue is not whether a person can afford counsel fees, the issue is if they got a raw deal from a public body or somebody acting under color of State Law.

THE COURT: That's not true, that's just not true. A public body such as a Board of Adjustment or Rent Control Board or a Planning Board is entirely different then having the police come down and beat them up. That's what those cases were all about. And it's as I say a discretionary call with The Court and I'm exercising my discretion and I'm not going to allow counsel fees. I'm going to remand this case for a rehearing and I am going to preclude Mr. B. from sitting as a Board Member, and if he wants to testify as a witness, he is permitted to do so, but within the confines of a witness testifying, not as to hearsay and so on and so forth.

MR. BABCOCK: Your Honor given the way in which we've progressed today, I don't know if you want the filing, but I will indicate to you that on behalf of my client I would consent at this juncture to the entry of an order with respect to the balance of the case. I don't know how you intend this to be addressed, whether you're giving us an indication and you want us to go talk about settling, I'm unclear —

THE COURT: A settlement is always the best way to [18] handle a case, if you can do it that way. I'm claiming that this man was put upon by this one board member.

MR. BABCOCK: Then I have no objection to that being the finding and there being an order entered to that effect given the other factual findings that you've entered on the record.

THE COURT: All right now I'm also telling you that if there's a way of settling this case, I can't see where there would be any problem with that either.

MR. BABCOCK: Very well.

MR. TOPAS: Your Honor —

THE COURT: Yes.

MR. TOPAS: I can't set forth the same stipulation as Mr. Babcock —

THE COURT: I'm not asking you to.

MR. TOPAS: I understand that, I just want to also state for

the record that at this point we would have a preference for being able to come in and go through a full argument. We were really not prepared toady, I understood this to be a conference, more on an informal basis, and we were not prepared for the outcome today and I would like to have an opportunity to spread forth all of the issues and points that my client is raising on this prerogative writ.

THE COURT: Are you kidding, you couldn't have possibly anything more. I read that brief, it covered [19] everything from one to ten. I mean and then you asked to put in a responding brief. I couldn't believe that. What more is there left to spread on the record, except the fact that it was read. But if you want this to be on the record, I will be happy to do that. The only problem that you have is Mr. Babcock is on trial for I would dare say a period of time and I have to come back from the hospital. I mean I'm not even out yet and I have to come back in a month.

MR. TOPAS: I understand Your Honor, but I'm merely saying at this point in time I'd like to be able to reserve on making a commitment one way or the other and have an opportunity to go back and discuss it with my client.

THE COURT: Well you certainly can do that, and just let them know in my office because I am in contact with them daily.

MR. BABCOCK: Very good Judge and we can also —

THE COURT: And then talk to the Township Committee Mr. Babcock.

MR. BABCOCK: I will Your Honor.

Appendix G

THE COURT: About trying to settle this matter because I think that there are things that to me appeared and I'm not offering my judgment in place of the Board's judgment, I would never think of doing that, but I think there are things in there that because of Mr. B's prejudice were really not properly considered. And I'm not talking about anything [20] specific, oh yes, let me just give you one example. There was evidence that somebody saw one of his trucks (indiscernible) fire hydrant. But he testified under oath without any opposition that whatever harm that was done at that time was fixed. And then they go and take off half of the amount of the fire hydrant. Now we're very loose on rules of evidence and so on and so forth, but not that loose. I mean I can remember that specifically because that was uncontradicted evidence. That even if he broke it, he fixed it. And then he had to come in and he had to replace it. And when the Board took off that however many dollars I think it was four hundred and fifty dollars or some amount like that, there was just no basis for that. So I think that you should go really through these things one by one and come to some kind of accommodation.

MR. BABOCK: I will recommend that Your Honor.

THE COURT: Right and I am asking Mr. Topas to discuss that with his client as well. All right.

MR. BABCOCK: Very good Judge.

MR. TOPAS: Thank you Your Honor

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Appendix G

[21] STATE OF NEW JERSEY)
) ss
COUNTY OF MONMOUTH)

I, PHYLLIS BINDER, assigned transcriber, do affirm that the foregoing is a true and accurate transcript of the proceedings in the matter of Galaxy Manor versus Dover Township Rent Leveling Board on October 25, 1991, in the Ocean County Superior Court, Civil Part, and recorded on Tape #RBC-159-91, Index #0008-1724, of that court.

Date: June 24, 1993

s/ Phyllis Binder
Phyllis Binder
BESTWAY TYPING UNLIMITED